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The Supreme Court as the "Grand Mediator" in Social Regulation of the Media

De Gustibus Non Disputandum Est: Or Are They?

by
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I. Introduction

The law is often seen as the grand mediator between what individuals want to see and hear and what society, *writ large*, determines an individual ought to see and hear. Because of this, issues of diversity, choice, and taste are especially at the forefront in the area of entertainment law. In this context, the United States Constitution operates as the medium for this mediation function. The Constitution provides the standard to evaluate the various regulatory and statutory schemes that are designed to strike a balance between individual rights and societal concerns in a broad area of the law called "social regulation" of the media.

Contemporary students of the law and the media (broadly construed to include motion pictures, DVDs, music, books, the radio and television, and more recently, the Internet) may consider the issue to be new or novel, fully dependent on modern means of communication and delivery. Interestingly, the debate may have been framed most aptly in the historical context of the 1950s, with its genesis in a somewhat anachronistic case, *Joseph Burstyn, Inc. v.*

Wilson.[1] In *Burstyn* the court addressed the proposed banning of a film on the ground that it was "sacrilegious."[2] After reviewing the facts, law, and implications of *Burstyn* in Part II, Part III of this article will continue the societal and constitutional dialogue by reviewing the restrictions imposed on the public airways (the radio) by reviewing *Federal Communications Commission v. Pacifica Foundation*, a case in which an objection was raised as to the content of a broadcast which was not judged to be "obscene," but instead "indecent."[3] In Part IV, this article will discuss the constitutionality of two statutory provisions that were enacted by Congress to protect minors from "indecent" and "patently offensive" communications on the Internet, as presented in *Reno v. American Civil Liberties Union.*[4] Part V of this article reviews two congressional statutes enacted in response to the Supreme Court's decision in *Reno v. American Civil Liberties Union* that specifically relate to information and images received on the Internet.

Finally, in Part VI, we will offer some concluding comments relating to the international aspects of controls placed on the Internet, most especially by China, and the general issues presented by the use of Internet filters as society moves to control the messages received via the Internet, especially for one particular class of American citizens.

In this analysis, we raise several practical and policy questions. What should be the parameters of regulation in these areas? Is there a role for society through its elected officials or through the regulatory process? Are matters of taste not subject to dispute? And who would settle such disputes?

II. A Constitutional Backdrop from History

> I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in the area are constitutionally limited to hard core pornography. I shall not today attempt further to define the kind of materials I understand to be embraced within that shorthand description;

1. 343 U.S. 495 (1952).
2. *Id.* at 497.
3. 438 U.S. 726, 744 (1978).
4. 521 U.S. 844, 849 (1997).

> and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .[5]

The core issue presented in *Burstyn v. Wilson* was rather straightforward: "the constitutionality, under the First and Fourteenth Amendments, of a New York statute which permitted the banning of motion picture films on the ground that they are sacrilegious."[6] The words of the statute seemed simple and straightforward enough. The first paragraph of the statute, a standard licensing statute, made it unlawful:

> to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel . . . unless there is at the time in full force and effect a valid license or permit thereof of the education department . . . .[7]

However, the statute further provided:

> The director of the (motion picture) division (of the education department) or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture submitted to them as herein required, and unless such film or part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such character that its exhibition would tend to corrupt the morals or incite to crime, shall issue a license therefore. If such director or, when authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefore a

5. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *See also* DAVID C. BRODY ET AL., CRIMINAL LAW 121–22 (Ruth Bloom ed., Aspen Publishers, Inc. 2001).

6. *Burstyn*, 343 U.S. at 497.

7. *Id.* (citation omitted). *See also* 51 AM. JUR. 2d *Licenses and Permits* § 50 (1970). "The right of a municipal corporation to impose [revenue license charges] upon an occupation or business which is conducted within the city limits, although a portion of the business was carried on outside of the city, is generally recognized." City of Sedalia v. Standard Oil Co. of Ind., 66 F.2d 757, 761 (8th Cir. 1933) (citations omitted). Generally, the legislature cannot confer on a municipality the power to impose revenue license charges on occupations carried on outside the municipality's territorial limits. White v. City of Decatur, 144 So. 873, 874 (Ala. 1932) (citations omitted). *Accord* City of Sedalia v. Shell Petroleum Corp., 81 F.2d 193, 197 (8th Cir. 1936); Robinson v. City of Norfolk, 60 S.E. 762, 763 (Va. 1908).

written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.[8]

After granting a license for the showing of the film *The Miracle*[9] on November 30, 1950, the New York State Board of Regents received "hundreds of letters, telegrams, post cards, affidavits, and other communications" both in protest and in support of the exhibition of the film.[10] As a result, the Chancellor of the Board of Regents requested that three members of the Board, which constitutes the statutory head of the state department of education, view the film.[11] After viewing the film, this committee reported to the Board that, in its opinion, there was a basis for the claim that the picture was "sacrilegious."[12] On January 19, 1951, the Regents directed the distributor to show cause, at a hearing scheduled for January 30, why its license to show *The Miracle* should not be

8. *Burstyn*, 343 U.S. at 497 (citation omitted).

9. For a very interesting historical review of the factual circumstances and background of the case, including an insight into the role played by the Roman Catholic Church, Francis Cardinal Spellman, and the "Legion of Decency," *see* Marjorie Heins, *The Miracle: Film Censorship and the Entanglement of Church and State* (2003), *reprinted in* DEFENDING THE FIRST: COMMENTARY ON THE FIRST AMENDMENT ISSUES AND CASES, (J. Russomanno ed., Lawrence Erlbaum Associates 2005), *available at* www.fepproject.org/commentaries/themiracle.html. As noted by the author: "Late in December 1950, an obscure foreign movie called *Il Miracolo* opened at the Paris Theater in Manhattan. Directed by the pioneer of Italian neorealism, Roberto Rossellini, *The Miracle* is a religious parable featuring a dim-witted peasant woman, Nanni (played brilliantly by Anna Magnani), who is plied with drink and then seduced by a vagabond whom she mistakes in her stupor for St. Joseph. (St. Joseph is played by the young Federico Fellini, who also wrote the screenplay.)" *Id.* Cardinal Spellman is described as a "right-winger" whose political power was such that he was known as the "American Pope." *Id.* Ironically, Cardinal Spellman had not seen *The Miracle*, but he had heard about it from various sources. *Id.* Apparently, as Heins notes, this was enough for him to condemn the film as "a despicable affront to every Christian" and "a vicious insult to Italian womanhood" which should really be named "'Woman Further Defamed,' by Roberto Rossellini." *Id. Accord Spellman Urges 'Miracle' Boycott*, N.Y. TIMES, Jan. 8, 1951, at 1, 14 (quoting the entire statement of the Cardinal). Spellman said it was "a blot upon the escutcheon of the Empire State that no means of appeal to the Board of Regents is available to the people for the correcting of the mistake made by its motion picture division" in giving a license to exhibit *The Miracle* in the first place. *Id. See also* ALAN WESTIN, THE MIRACLE CASE: THE SUPREME COURT AND THE MOVIES 9 (University of Alabama Press 1961); Bosley Crowther, *The Strange Case of 'The Miracle,'* ATLANTIC MONTHLY (Wash., D.C.), Apr. 1951, at 37.

A much longer summary of the plot of the film may be found in *Burstyn*, 343 U.S. at 507–09 (Frankfurter, J., concurring).

10. *Burstyn*, 343 U.S. at 498.

11. *Id.*

12. *Id.*

rescinded on that ground.[13] Appellant appeared at the hearing which was conducted by the very three-member committee that had previously reviewed the film.[14] It challenged the jurisdiction of the committee to proceed with the case.[15] On February 16, 1951, the Regents, after viewing the film, determined that it was indeed "sacrilegious" and ordered the Commissioner of Education to rescind the license to exhibit the picture.[16] The Commissioner did so at the behest of the Board.[17]

In challenging the determination of the Board of Regents, the appellant, Joseph Burstyn, Inc., brought suit in New York based on several grounds. First, that the statute violated the Fourteenth Amendment[18] as a *prior restraint* on freedom of speech and of the press. Second, that the statute was invalid under the Fourteenth Amendment as a *violation of the separation of church and state* and as a *prohibition of the free exercise of religion.* Finally, that the term *"sacrilegious" was so vague and indefinite* as to offend due process.[19]

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 499.

17. *Id.*

18. The text of the Fourteenth Amendment provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV.

19. *Burstyn*, 343 U.S. at 499. The exact nature of a party's due process rights is normally determined in a hearing or trial before either a judicial, executive, or administrative tribunal. Procedural due process is essentially based on the concept of "fundamental fairness." At a minimum, procedural due process would include an individual's right to be adequately *notified* of charges or proceedings involving him/her or his/her interests, and the *opportunity to be heard.* This minimum protection extends to all proceedings by the government or by "other parties" that can result in an individual's deprivation, whether civil or criminal in nature, of life, liberty, or property. An important analysis made by the late Judge Henry Friendly denotes these important procedural safeguards in both content and relative priority in evaluating whether a party has been accorded due process of law: an unbiased tribunal, notice of the proposed action and the grounds asserted for it, opportunity to present reasons why the proposed action should not be taken, the right to present evidence, including the right to call witnesses, the right to know opposing evidence, the right to cross-examine adverse witnesses, a decision based exclusively on the evidence presented, opportunity to be represented by counsel, requirement that the tribunal prepare a record of the evidence presented, requirement that the tribunal prepare written findings of fact and reasons (conclusions of law) for its decision. *See generally* Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

The Appellate Division rejected all of these contentions and upheld the Regent's determination.[20] On appeal, the New York Court of Appeals, New York's highest state court, affirmed the order of the Appellate Division.[21] The case reached the United States Supreme Court on appeal.[22]

By the time the United States Supreme Court considered *Burstyn*, it was well established that despite any earlier opinion to the contrary, the "liberty of speech and of the press which the First Amendment[23] guarantees against abridgement by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action."[24] The Supreme Court noted that *Burstyn* was the first case to present squarely the question whether "motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of 'speech' or 'the press.'"[25]

The Court concluded that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendment."[26] In so doing, the Court rejected twin contentions, the first being that motion pictures should not fall within the protection of the First Amendment because "their production, distribution, and exhibition is a large-scale business conducted for private profit."[27] The Court stated that it was well-decided that the fact that "books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First

20. Burstyn v. Wilson, 104 N.Y.S. 2d 740 (N.Y. App. Div. 1951).

21. Burstyn v. Wilson, 101 N.E.2d 665 (N.Y. 1951).

22. *Burstyn*, 343 U.S. at 499.

23. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

24. *Burstyn*, 343 U.S. at 500 (citations omitted). The Court made reference to its earlier decision in *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U.S. 230 (1915). *Burstyn*, 343 U.S. at 499–501. *See also* Richard J. Hunter, Jr. & Paula Alexander Becker, *Is It Time to Revisit the Doctrine of 'State Action' in the Context of Intercollegiate and Interscholastic Sports?* 14 VILL. SPORTS & ENT. L.J. 191, 192–98 (2007) (discussing the incorporation doctrine, and the debate that has ensued between "selective" rather than "total" incorporation of provisions of the Bill of Rights).

25. *Burstyn*, 343 U.S. at 501.

26. *Id.* at 502, n.12 (citing United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948): "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

27. *Burstyn*, 343 U.S. at 501.

Amendment."[28] The Court failed to ascertain any reason why the production and showing of a motion picture for profit should result in any different treatment or in a different conclusion than would be compelled by a traditional First Amendment analysis.[29]

Secondly, the Court also rejected the contention that motion pictures "possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression" and thus might be subject to *disqualification* from First Amendment protection.[30] The Court concluded that "[e]ven if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment Protection."[31] Interestingly, however, the Court noted that "[i]f there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here."[32] This vague formulation leaves open a potentially permissible scope of community control, a consideration which will be relevant to the forthcoming discussion of restrictions placed on the media concerning issues relating to minors.

A. Absolute Freedom or Is There Room for Some Regulation?

Having decided that the "liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments,"[33] the Court noted that this protection is not absolute and does not extend to a right to "exhibit every motion picture of every kind at all times and all places."[34] Perhaps prophetically, presaging the amazing technological changes to come, the Court also noted: "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression."[35] What the Court did make clear, however, is an important constitutional principle: "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule. There is no justification in this case for making an exception to that

28. *Id.* (citations omitted).
29. *Id.*
30. *Id.* at 502.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 503.

rule."[36] The Supreme Court left open the question, however, whether there might be cases in which such a justification exists.[37]

The Supreme Court also tackled two additional issues. The first was the issue of a *prior restraint* imposed by the New York state regulation which did not seek to punish offensive speech, but which required that "permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated."[38] The second issue involved the criteria of "sacrilege" as a possible *exception* to the general rule.[39]

B. Censorship, the Media, and Prior Restraint: A Brief Review

The First Amendment does not protect all forms of speech.[40] However, the government may not establish a system of censorship to regulate in advance what may be uttered or spoken.[41] Thus, the government is generally restricted from seeking to enjoin different

36. *Id.*

37. *Id.* at 505–06.

38. *Id.*

39. *See id.* at 504.

40. While outside the narrow focus of this article, Justice Murphy, writing for a unanimous Court in *Chaplinsky v. New Hampshire*, identified certain exceptions:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

315 U.S. 568, 571–72 (1942). In terms of a discussion of censorship and the media, the discussion of "obscenity" may be most relevant.

As stated in *Chaplinsky*, obscenity is not an essential part of the expression of ideas, is of "slight social value," and the benefits derived are outweighed by the social interest in morality. 315 U.S. at 572. Obscenity is not communication and is, by definition, "utterly without redeeming social importance." Roth v. United States, 354 U.S. 476, 484 (1957). Obscenity lacks "serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). Based upon both *Roth* and *Miller*, obscenity is the description or depiction of sexual conduct which, taken as a whole, by the average person: (i) appeals to the prurient interest in sex, using a community standard; (ii) is patently offensive and an affront to contemporary community standards; and (iii) lacks serious value (literary, artistic, political, or scientific), using a national reasonable person standard.

41. *See, e.g.*, Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 62–63 (1989) (noting that to avoid the risk of prior restraint on speech, the government must use "rigorous procedural safeguards" before it may seize material which it considers to be obscene) (citations omitted).

forms of speech or to employ other forms of prior or previous restraints.[42]

Professors Lockhart, Kamisar, and Chopper frame the issue thusly:

> At the risk of oversimplifying, a prior restraint is a method of regulating communication that empowers the government to decide *in advance* whether particular persons may engage in a desired communication; such decisions ordinarily take the form of governmental orders or court injunctions restraining particular persons from engaging in specified communicative activities, or requiring that a prior license or permit be obtained to engage in such activities.[43]

Would this general proscription apply to the New York statute?

As a rule, the Supreme Court has been especially concerned about a variety of restrictions that may be considered as "previous restraint" on speech that are to be "especially condemned."[44] However, once again, the Court noted "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases."[45] This imposes a heavy burden on the State to demonstrate that a specific limitation, statute, or administrative regulation would provide such an exceptional case. Several "exceptional circumstances," however, have been held to warrant an application of prior restraint. For example, in *Near v. Minnesota*, the Supreme Court held that the First Amendment would not bar an injunction against publishing the sailing date of troop ships in times of war.[46] In *Nebraska Press Association v. Stuart*, the Supreme Court held that an injunction may issue as a prior restraint against media reporting of criminal proceedings in order to preserve a fair trial if (i) there is a clear and present danger that pretrial publicity *would* threaten a fair trial, (ii) alternative measures are inadequate, and (iii) an injunction would effectively protect the accused.[47] In *Seattle Times v. Rhinehart*, the Supreme Court held that a court may issue a protective order against the dissemination of information

42. Near v. Minnesota, 283 U.S. 697, 713 (1931).

43. WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION 591 (West Publishing Company 1970)(5th ed. 1981).

44. *Burstyn*, 343 U.S. at 503 (citing *Near*, 283 U.S. at 713–19).

45. *Burstyn*, 343 U.S. at 503–04 (quoting *Near*, 283 U.S. at 716).

46. 283 U.S. at 713–22.

47. 427 U.S. 539, 562 (1976).

gained through the process of pretrial discovery and which has not yet been admitted at trial on the ground that there is a substantial governmental interest in preventing abuse of information that would not have been obtained from other sources.[48]

In these "exceptional cases," the Supreme Court has recognized that strong procedural safeguards are constitutionally required.[49] Unless there is a real question of an emergency, some form of adversary hearing—conducted after adequate notice to all interested parties—is generally required in any case where freedom of speech is burdened by a prior restraint.[50] However, a permanent injunction forbidding the distribution of a publication that, after a full judicial hearing, is determined to be obscene may be upheld.[51] In terms of a "large-scale" seizure of allegedly obscene books and films, such actions clearly constitute a prior restraint and must be preceded by a full adversary hearing and a judicial determination concerning the core issue of obscenity.[52] Seizing copies of a film (or a book) to preserve them as evidence for a judicial determination is permitted "pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate . . . ."[53] And, as noted, a prompt judicial determination of obscenity must be available after the seizure.[54]

As stated in *Burstyn*, "[i]n the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case"[55]—a burden the state could not bear.

C. Should the State Punish a "Secular Sacrilege"?

The second issue deals with the definition of sacrilege as defined by New York's highest court: "no religion, as that word is understood

48. 467 U.S. 20 (1984).

49. *See, e.g., Fort Wayne Books*, 489 U.S. at 62.

50. *See* Carroll v. Prince Anne County, 393 U.S. 175, 180 (1968) (invalidating the award of an *ex parte* injunction restraining members of a political party from holding rallies); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (holding that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."); Friendly, *supra* note 19 (promulgating a list of basic "due process" safeguards according to Judge Friendly).

51. *See* Marcus v. Search Warrants of Property at 104 E. Tenth St., 367 U.S. 717, 734 (1961)(citing Kingsley Books, Inc. v. Brown, 354 U.S. 436, 437 (1957)).

52. *See* New York v. P.J. Video, 475 U.S. 868, 873 (1986)(citations omitted).

53. Heller v. New York, 413 U.S. 483, 492 (1973).

54. *Id.*

55. *Burstyn*, 343 U.S. at 504.

by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule."[56] Does this formulation lead to an exception to the rule of freedom of expression, "which a state may carve out to satisfy the adverse demands of other interests of society[?]"[57]

In response, the Supreme Court addressed a number of concerns regarding the power of the censor.[58] The court concluded that the New York court's definition of "sacrilegious" was "broad and all-inclusive."[59] As a result, "the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."[60] Because of this unbridled discretionary power, the Supreme Court noted that "the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority."[61] The Court thus concluded that New York could not vest such unlimited discretionary powers in a censor exercising power on behalf of the state.[62]

Secondly, an application of the "sacrilegious" standard might raise further constitutional questions "under the First Amendment's

56. *Id.* (citing *Burstyn v. Wilson,* 101 N.E.2d 665, 672 (1951)). The New York Court of Appeals offered the following additional definition for *sacrilegious*: "the act of violating or profaning anything sacred." 101 N.E.2d at 670. In upholding the regulation, the Court of Appeals also approved the Appellate Division's interpretation: "[a]s the court below said of the statute in question, 'All it purports to do is bar a visual caricature of religious beliefs held sacred by one sect or another . . . .'" *Id.* at 672 (citation omitted). The dissenting opinion of Justice Fuld refutes this formulation and definition. Justice Fuld states: "The drastic nature of such a ban is highlighted by the fact that the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive." *Id.* at 680 (Fuld, J., dissenting).

57. *Burstyn*, 343 U.S. at 504.

58. *Id.* at 505.

59. *Id.* at 504.

60. *Id.* at 504–05.

61. *Id.* at 505.

62. *Id. See also* Kunz v. New York, 340 U.S. 290, 292 n.1 (1951) (involving a New York City ordinance that made it unlawful to hold worship meetings on the street without first obtaining a permit from the city police commissioner and making it an offense to "ridicule or denounce any form of religious belief . . . .").

guaranty of separate church and state with freedom of worship for all."[63]

In summary, in analyzing the New York statutory and regulatory regime under a First Amendment freedom of speech standard, the United States Supreme Court concluded that New York had "no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views."[64] The Court concluded in very strong language: "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures."[65]

Mr. Justice Roberts, writing for a unanimous Court in *Cantwell v. Connecticut*, presaged an apt summary of the important policy questions that would later be addressed in *Burstyn v. Wilson*:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to

63. *Burstyn*, 343 U.S. at 505. For an exhaustive discussion of the meaning of sacrilege, *see id.* at 518–33 (Frankfurter, J., concurring). *See also id.* at 533–40 (Frankfurter, J., concurring).

64. *Id.* at 505.

65. *Id.* By implication, the Court alluded to what is termed "the Establishment Clause." Under an Establishment Clause analysis, it is improper for the government to sponsor or endorse a religion, to financially support a religion, or to become actively involved in religious activities. *See generally* Walz v. Tax Comm'n, 397 U.S. 664 (1970). The Establishment Clause also bars official preference of one religious denomination (in this case, the Catholic Church) over another. Any such law or regulation would be subject to strict scrutiny analysis and would be held unconstitutional *unless* the government proves that the law or regulation meets some compelling state interest. *See* Larson v. Valente, 456 U.S. 228, 246–47 (1982). If a law is facially neutral, as might be argued in *Burstyn*—since the regulation appears to impact only those motion pictures that are "sacrilegious," without referencing any particular religion's doctrine or tenets—the Court will apply what has come to be known as the "Lemon Test." Under this test, the law or governmental action must: have a secular purpose, have a principal or primary effect that neither advances nor inhibits religion, and not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal citations omitted).

In applying the test enunciated above, the Court will also consider whether the challenged government practice has the purpose or effect of "endorsing" religion. *See* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989).

> enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.[66]

III. Regulation of Indecent Speech in Broadcast Media: Administrative Agencies "Channel" and "Restrict"

The State has consistently maintained that it has an interest in protecting children from "sexually offensive materials."[67] The State's focus may be especially centered on broadcast media because of its overwhelming potential for direct and instantaneous transmission into the home through a wide variety of vehicles, modes, and equipment. In Part III of the article, we analyze censorship of the radio. Indeed, "[o]f special concern to the [Federal Communications] Commission as well as parents is the first point regarding the use of radio by children."[68]

Traditionally, judges, legislators, and regulators have advanced several justifications for treating broadcast speech differently than other forms of expression.[69] The Federal Communications Commission has enunciated and embraced "special considerations" in the context of radio transmissions.[70] Today, many of these considerations would have equal, perhaps more prescient, implications for the Internet given the increased prevalence of personal computers, mobile computing, Internet-capable phones, and instant messaging capabilities. Although not all of the rationales would obtain, these special considerations include the fact that

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference . . . (3) unconsenting adults may tune in a station

66. 310 U.S. 296, 310 (1940).

67. *See, e.g.*, Laura Vanderstappen, *Internet Pharmacies and the Specter of the Dormant Commerce Clause*, 22 WASH. U. J.L. & POL'Y 619, 635–36 (2006) (citing American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 177–78 (S.D.N.Y. 1997).

68. *Pacifica Found. Station*, 56 F.C.C.2d 94, 97 (1975).

69. F.C.C. v. Pacifica Found., 438 U.S. 726, 731 n.2 (1978) (citations omitted).

70. *Pacifica Found. Station*, 56 F.C.C.2d at 96–97 (citations omitted).

> without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.[71]

Congress has broadly empowered the Federal Communications Commission ("FCC"), the successor to the Federal Radio Commission, with a wide variety of administrative tools and powers. These include the power of the FCC to revoke a station's license, issue a cease and desist order, or impose a monetary forfeiture for a violation of section 1464 of the Communications Act of 1934.[72] In addition, the FCC can also deny license renewal or grant a short term renewal.[73]

The FCC has found that there is a constitutional power to regulate indecent broadcasting under two separate statutes: 18 U.S.C. § 1464, which forbids the use of "any obscene, indecent, or profane language by means of radio communication[s],"[74] and 47 U.S.C. § 303(g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest."[75]

A. Enter the "Satiric Humorist" George Carlin

Just as in *Burstyn v. Wilson*, the United States Supreme Court was once again confronted with an alleged violation of an administrative rule—this time the October 30, 1973, broadcast of the now-famous 12-minute monologue, entitled "Filthy Words," by the American satirist and humorist George Carlin.[76]

In *Federal Communications Commission v. Pacifica Foundation,* the United States Supreme Court framed the issue as follows: "whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene."[77]

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71. *Pacifica Found.*, 438 U.S. at 731 n.2 (citing 56 F.C.C.2d at 97).

72. 47 U.S.C. §§ 312(a), 312(b), 503(b)(1)(D) (2006 & Supp. 2008).

73. 47 U.S.C. §§ 307(c)(1), 308(b) (2006).

74. 18 U.S.C. § 1464 (2006) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."

75. Section 303(g) of the Communications Act of 1934 provides: "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . generally encourage the larger and more effective use of radio in the public interest."

76. *Pacifica Found*, 438 U.S. at 729.

77. *Id.*

Pursuant to a complaint received from a radio listener about the broadcast, on February 21, 1975, the FCC issued a declaratory order determining that Pacifica "could have been the subject of administrative sanctions."[78] While the Commission did not impose formal sanctions against Pacifica, it stated that "the order would be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."[79] The Commission sought to utilize the controversy surrounding Carlin's monologue as an opportunity to "'clarify the standards which will be utilized in considering' the growing number of complaints about indecent speech on the airwaves."[80]

Although the Commission refused to characterize the language as "necessarily obscene," it stated that it was nevertheless "patently offensive."[81] Interestingly, the Commission expressed the view that such language would best be regulated by:

> [P]rinciples analogous to those found in the law of nuisance where the "law generally speaks to channeling behavior more than actually prohibiting it.... [The] concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[82]

"In summary, the Commission stated: 'We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. § 1464.'"[83]

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78. *Id.* at 730 (citing 56 F.C.C.2D at 99).

79. *Id.* (citing 56 F.C.C.2d at 99).

80. *Id.* at 731 (citing 56 F.C.C.2d at 94).

81. *Id.*

82. *Id.* at 731–32 (citing 56 F.C.C.2d at 98). As footnote five of the case indicates, if a broadcast was deemed not to be obscene, but rather indecent—presumably because it contained some "literary, artistic, political, or scientific value"—and was preceded by an effective warning, such a broadcast might not be deemed indecent *if broadcast in the late evening, but would be so if broadcast during the day*, when children would presumably be in the audience. *Pacifica Found.*, 438 U.S. at 732 n.5 (citing 56 F.C.C.2d at 98).

83. *Pacifica Found.*, 438 U.S. at 732 (citing 56 F.C.C.2d at 99). The decision of the Commission was not unanimous and betrayed a wide divergence of opinion on the issue of

After the Commission issued its order, it was asked to further clarify its opinion by issuing a ruling that the broadcast of indecent words as a part of a live newscast would not be prohibited.[84] In response, the Commission issued another opinion in which it stated that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it."[85] The Commission, however, refused to go any further, citing its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them" and declining to comment on various hypothetical situations presented in the petition.[86]

B. A Procedural Fragment and Quagmire in the DC Circuit?

The United States Court of Appeals for the District of Columbia Circuit reversed the FCC, with each of the three judges (Chief Judge Bazelon, and Judges Tamm and Leventhal) writing separate opinions.[87] Judge Tamm concluded that the order represented *censorship*[88] which is expressly forbidden by section 326 of the Communications Act.[89] In the alternative, Judge Tamm read the

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the relationship of obscenity and indecency—a divergence that would carry through to the entire appellate process. *Pacifica Found. Station*, 56 F.C.C.2d 94. For example: Chairman Wiley concurred in the result without joining the opinion. *Id.* at 94. Commissioners Reid and Quello filed separate statements expressing their opinion that the language was inappropriate for broadcast *at any time*. *Id.* at 102–03. Commissioner Robinson was joined by Commissioner Hooks in filing a concurrent statement expressing the opinion that:

> [W]e can regulate offensive speech to the extent it constitutes a public nuisance.... The governing idea is that "indecency" is not an inherent attribute of words themselves; it is rather a matter of context and conduct.... If I were called upon to do so, I would find that Carlin's monologue, *if it were broadcast at an appropriate hour and accompanied by suitable warning*, was distinguished by sufficient literary value to avoid being "indecent" within the meaning of the statute.

Id. at 107–08 (emphasis added).

84. *Pacifica Found.*, 438 U.S. at 732.

85. *Pacifica Found.*, 59 F.C.C.2d 892, 892 (1976). As found in the FCC's opinion, the use of the word "channel" may fairly be interpreted to mean "restrict."

86. *Pacifica Found.*, 438 U.S. at 733 (citing 59 F.C.C.2d at 893).

87. *Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (1977).

88. *Id.* at 13.

89. 47 U.S.C. § 326 (2006). Section 326 provides:

Commission's opinion as the equivalent of an administrative rule and concluded that it was "overbroad."[90] While Chief Judge Bazelon concurred in the result, he was persuaded that the prohibition against censorship found in section 326 was inapplicable to broadcasts that were expressly prohibited by section 1464 (which forbad the use of any "obscene, indecent, or profane language").[91] Judge Bazelon concluded, however, that section 1464 must be "narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment."[92] Judge Leventhal, in dissent, stated that the only issue was whether the Commission could regulate the language "as broadcast."[93] Judge Leventhal emphasized the societal interest in protecting children, "not only from exposure to indecent language, but also from exposure to the idea that such language has official approval."[94] Judge Leventhal concluded that the FCC had "correctly condemned the daytime broadcast as indecent."[95]

The United States Supreme Court granted certiorari.[96] The Supreme Court extrapolated four questions that would encompass their review:

> (1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent "as broadcast"; (2) whether the Commission's order was a form of censorship forbidden by § 326 [of the Communications Act]; (3) whether the broadcast was indecent within the meaning of § 1464; and (4) whether the order violates the First Amendment of the United States Constitution.[97]

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

90. *Pacifica Found. v. F.C.C.*, 556 F.2d at 17.
91. *Id.* at 20 (citation omitted).
92. *Pacifica Found.*, 438 U.S. at 733–34 (citing 556 F.2d at 24–30).
93. *Pacifica Found. v. F.C.C.*, 556 F.2d at 30.
94. *Pacifica Found.*, 438 U.S. at 734 (citing 556 F.2d at 37).
95. *Id.*
96. *F.C.C. v. Pacifica Found.*, 434 U.S. 1008 (1978).
97. *Pacifica Found.*, 438 U.S. at 734.

C. The Supreme Court Weighs In

In answering these questions, the United States Supreme Court stated that it would review section 326 as it related to the issue of censorship and consider whether speech that is concededly not obscene may nonetheless be restricted as "indecent" under the authority of 18 U.S.C. § 1464.[98] Section 29 of the Radio Act of 1929, the precursor to section 326 of the Communications Act, contained important provisions dealing both with a prohibition against censorship, *a pre-broadcast power*, and a prohibition against the utterance of "obscene, indecent, or profane language" reviewable *post-broadcast* by the then Federal Radio Commission.[99] Section 29 reads as follows:

> Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.[100]

This provision against censorship thus "unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise materials considered inappropriate for the airwaves."[101] However, the Court also added that the same prohibition against prior censorship has "never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties."[102] This was the same construction placed on the relevant provisions of the Communications Act of 1934 by which courts and the Federal Radio Commission held that section 29 deprived the Commission of the power to subject the "broadcasting matter to scrutiny prior to its release," but concluded that the Commission had the "'undoubted right' to take note of past program content when considering a

98. *Id.* at 735.

99. Radio Act, ch. 169, § 29, 44 STAT. 1162, 1173 (1927) (current version at 47 U.S.C. § 326).

100. *Id.* at 1172–73.

101. *Pacifica Found.*, 438 U.S. at 735.

102. *Id.*

licensee's renewal application."[103] The successor to the Federal Radio Commission, the Federal Communications Commission, has accepted this interpretation.[104]

Thus, the Court concluded that section 326 did not limit the Commission's authority to impose sanctions *post-broadcast* on licensees who engage in obscene, indecent, or profane broadcasting.[105]

Having decided this threshold question, the Supreme Court addressed the question in the case at hand: whether the afternoon broadcast of the "Filthy Words" monologue was in fact indecent within the meaning of section 1464 of the Act.[106]

1. Was the "Filthy Words" Monologue Indecent or Merely Satire? Or Perhaps Both?

The Commission specifically identified several words in the monologue that referred to excretory or sexual activities or organs, and stated that the *repetitive* and *deliberate* use of those words in an afternoon broadcast when children were in the audience was patently offensive.[107] On this basis, the Commission held that the broadcast was indecent.[108] While Pacifica did not quarrel with the Commission's conclusion that the afternoon broadcast was patently offensive, Pacifica objected to the Commission's definition of indecency and argued that the broadcast was not indecent because it lacked a prurient appeal.[109]

The Supreme Court rejected this contention, relying on the "plain language" of the statute; that is, the Court noted that the words "'obscene, indecent, or profane' are written in the disjunctive," with

103. *Id.* at 736 (citing KFKB Broad. Assn. v. Fed. Radio Comm'n, 47 F.2d 670, 672 (1931)). In *KFKB Broad. Assn.*, the Circuit Court held that there had been no attempt on the part of the commission to engage in any prior censorship. 47 F.2d at 672. Rather, "In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's *past conduct*, which is not censorship." *Id.* (emphasis added).

104. *See, e.g.*, Anti-Defamation League of B'nai B'rith v. F.C.C., 403 F.2d 169 (1968) (Wright, J., concurring) (pointing out that the Commission is not prohibited from canceling the license of a broadcaster who persists in a course of improper programming by allowing "course, vulgar, suggestive, double-meaning" programming). *Id.* at 173 n.3 (citations omitted).

105. *Pacifica Found.*, 438 U.S. at 738.

106. *Id.* at 738–39.

107. *Id.* at 739.

108. *Id.*

109. *Id.*

each word having a separate and distinct meaning.[110] The Court noted that the concept of "prurient interest" or "prurience" is an element of its *obscenity jurisprudence*, while the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[111] Relying on prior decisions and the language and history of section 1464, the Supreme Court rejected Pacifica's contention that prurience was an essential component of indecent language, and the Court concluded that "there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast."[112]

2. The Constitutional Attack

Pacifica raised two core constitutional issues in attacking the Commission's order. First, Pacifica argued that the Commission's construction of the statutory language "broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast... is not itself protected by the First Amendment."[113] Second, Pacifica asserted in broad terms that inasmuch as the recording was not obscene, the Constitution "forbids *any* abridgement of the right to broadcast it on the radio."[114]

The Supreme Court rejected the first contention.[115] The Court noted that the Commission's "order was 'issued in a specific factual context,'"[116] and approved this approach, "for indecency is largely a function of context—it cannot be adequately judged in the abstract."[117] The Court noted that while it might be true that the Commission's order may lead some broadcasters to impose self-

110. *Pacifica Found.*, 438 U.S. at 739–40.

111. *Id.* at 740. The case provided a definition of the term *indecent* from Webster's Dictionary: "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . . ." *Id.* at 740 n.14. *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 802 (1991). The Court noted that in a related area—determining the validity of Section 1461 on the ground of a vagueness attack—the Supreme Court followed the holding of *Manual Enters. v. Day*. 370 U.S. 478 (1962). *Pacifica Found.*, 438 U.S. at 740. There, Justice Harlan wrote that the phrase "'obscene, lewd, lascivious, indecent, filthy or vile,' taken as a whole, was clearly limited to the obscene." *Pacifica Found.*, 438 U.S. at 740 (citing *Manual Enters.*, 370 U.S. at 483).

112. *Pacifica Found.*, 438 U.S. at 741.

113. *Id.* at 742.

114. *Id.* (emphasis added).

115. *Id.*

116. *Id.* (citing 59 F.C.C.2d at 893).

117. *Id.*

censorship, "[i]nvalidating any rule on the basis of its hypothetical application to situations not before this Court is 'strong medicine' to be applied 'sparingly and only as a last resort.'"[118] The Court concluded: "We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech."[119]

The second question proved to be more vexing. It was clearly a frontal assault on the power of the government, through the FCC, in non-obscenity cases. Namely, the Court was asked to address the question: "*whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances.*"[120] The Supreme Court conceded the obvious: The words in the Carlin monologue were unquestionably "speech" within the meaning of the First Amendment.[121] The Court also noted that the Commission's objections to the broadcast of the Carlin monologue were based in part on its content.[122] Pacifica asserted that the First Amendment prohibits all governmental regulation that depends on the content of speech.[123]

The Supreme Court rejected the imposition of such an absolute rule.[124] The Court engaged in an exhaustive First Amendment analysis of the issues of both content and context in light of the question whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content.[125] The

118. *Id.* at 743 (quoting Broderick v. Oklahoma, 413 U.S. 601, 613 (1973) (holding that a statute, which gives adequate warning of what activities it proscribes and sets forth explicit standards for those who must apply it, is not impermissibly vague)).

119. *Pacifica Found.*, 438 U.S. at 743. The Commission had commented quite strongly about the harmful societal effects of the language found in the Carlin monologue, stating: "Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions . . . ." 56 F.C.C. 2d at 98. Conceding that the monologue presents a point of view—attempting to show that the words it uses are "harmless" and that attitudes towards them are "essentially silly"—the Supreme Court nonetheless concurred with the Commission's view that had branded the monologue as indecent and stated, "[o]ur society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure." *Pacifica Found.*, 438 U.S. at 746 n.23.

120. *Pacifica Found.*, 438 U.S. at 744 (emphasis added).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Included in this contextual review is the oft-repeated formulation of Justice Holmes for the Court in *Schenck v. United States*:

Court noted that "obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards."[126] However, the Court made it clear:

> [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends.[127]

The Supreme Court then turned its attention to what has been termed the hierarchy of First Amendment values.[128] Conceding that words such as those found in the Carlin monologue, although ordinarily lacking in literary, political, or scientific value, might not be entirely outside the protection of the First Amendment, the Court

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> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Pacifica Found., 438 U.S. at 744–45 (quoting *Schenck*, 249 U.S. 47, 52 (1919)). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977) (paying heed to "'commonsense differences' between commercial speech and other varieties" and noting that the government may strictly regulate truthfulness in commercial speech); Gertz v. Welch, Inc., 418 U.S. 323 (1974) (treating libel actions against private citizens more severely than libel against public officials); Miller v. California, 413 U.S. 15 (1973) (wholly prohibiting obscenity); Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 52, 96 (1976) (refusing to hold that a "statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment.").

126. *Pacifica Found.*, 438 U.S. at 745 (citing Roth v. United States, 354 U.S. 476 (1957)).

127. *Id.* at 745–46.

128. *Id.* at 746.

stated that the constitutional protection accorded to such a communication containing "such patently offensive sexual and excretory language need not be the same in every context."[129]

Thus, the Supreme Court found that the content of Pacifica's broadcast of the Carlin monologue was "vulgar," "offensive," and "shocking."[130] Further, the Court stated that such content was not entitled to absolute constitutional protection under all circumstances.[131] The Court then turned to the remaining constitutional question. The Court would consider *the context of the broadcast "in order to determine whether the Commission's action was constitutionally permissible."*[132]

3. Context Provides a Clue to Supreme Court Analysis: The Media as Intruder

The Court turned to the question of *context* by citing *Joseph Burstyn, Inc. v. Wilson*, the object of detailed analysis in Part II of the article, noting that the Court has "long recognized that each medium of expression presents special First Amendment problems."[133] Recognizing the unique nature of radio communications,[134] the Supreme Court enunciated two important distinctions that had special relevance in deciding the remaining constitutional question.[135]

First, the Supreme Court recognized the obvious—that broadcast media as a whole has established a "uniquely pervasive presence" in the lives of all Americans.[136] The Court then raised an interesting perspective. In this context, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[137] Because the listener is constantly tuning in and out of broadcasts, it is unrealistic to think that a prior warning relating to

129. *Id.* at 746–47.

130. *Id.* at 747.

131. *Id.*

132. *Id.* at 747–48.

133. *Id.* at 748 (citing *Burstyn*, 343 U.S. at 502–03).

134. Unlike other "speakers," the Court noted that a broadcaster might be deprived of a license if the Commission decided that such an action would serve "the public interest, convenience, and necessity." *Pacifica Found.*, 438 U.S. at 748 (citing 47 U.S.C. § 309(a)).

135. *Id.* at 748–50.

136. *Id.* at 748.

137. *Id.* (citing Rowan v. Post Office Dept., 397 U.S. 728 (1970)).

potential offensive content could completely protect the listener from any unexpected offensive content.[138]

Second, because broadcasts are "uniquely accessible to children, even those too young to read.... Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[139] Thus, while other forms of offensive expressions may be off-limits to minors (for example, excluding those under eighteen from "adult" bookstores and certain motion picture theaters) without restricting the expression "at its source"—i.e., the book or the film itself—the same is not true for the radio.[140] The Court noted that adults who desire to purchase tapes and records or to view films or go to nightclubs to hear the kind of words found in the Carlin monologue may continue to do so.[141] Indeed, the Commission made it clear that it had not "unequivocally" prohibited broadcasts from containing the kind of speech found in the Carlin monologue, stating that it had not formally considered the separate question whether the broadcast might be appropriate for a late-night audience where the audience would contain few children.[142] Accordingly, "the ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."[143]

In sum, the Court stated that its ruling would be a narrow one, resting substantially on a "nuisance rationale under which context is

138. *Pacifica Found.*, 438 U.S. at 748–49. The Court did note that "[o]utside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away." *Pacifica Found.*, 438 U.S. at 749 n.27 (citation omitted). However, the Court has also noted:

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . we have at the same time consistently stressed that we are often "captives" outside the sanctuary of the home and subject to objectionable speech.

Pacifica Found., 438 U.S. at 749 n.27 (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

139. *Pacifica Found.*, 438 U.S. at 749. The Court had noted in *Ginsberg v. New York* that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. 390 U.S. 629, 639–40 (1968).

140. *Pacifica Found.*, 438 U.S. at 749.

141. *Id.* at 750 n.28.

142. *Id.* at 750 & n.28.

143. *Id.* at 750.

all-important."[144] The variables cited by the Court included the time of day of the broadcast, the content of the program in which the language was used, the composition of the audience, and the differences between radio, television, and "perhaps closed-circuit transmissions."[145]

Interestingly, the Court concluded with a reference to Justice Southerland's opinion in *Euclid v. Ambler Realty Co.*,[146] in which he wrote: "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."[147] The Court in *Pacifica* summarized: "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[148]

IV. The New Media: The Internet and the First Amendment

What, then, are the lessons of *Burstyn* and *Pacifica Foundation* that might prove helpful, and perhaps critical, in an analysis of the rules applicable to the Internet?[149] Enter the Attorney General Janet Reno (at least, by name), or rather the Congress of the United States!

The primary purpose of the Telecommunications Act of 1996 was to reduce regulation and encourage the "rapid deployment of new telecommunications technologies."[150] The Act includes seven Titles, six of which were the product of extensive committee hearings and the subject of a great deal of debate and discussion in Reports prepared by the various Committees of Jurisdiction of both the United States Senate and House of Representatives.[151] However, Title V, known as the "Communications Decency Act of 1996" ("CDA"), contained provisions that were added to the legislation

144. *Id.*

145. *Id.*

146. 272 U.S. 365 (1926).

147. *Pacifica Found.*, 438 U.S. at 750–51 (citing *Euclid*, 272 U.S. at 388).

148. *Id.*

149. For a discussion of the history and origins of the Internet, *see* Reno v. ACLU, 521 U.S. 844, 849–50 (1997).

150. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). As reported by the Museum of Broadcast Communications: "The Telecommunications Act of 1996 is a complex reform of American communication policymaking that attempts to provide similar ground rules and a level playing field in virtually all sectors of the communications industries." *U.S. Policy: Telecommunications Act of 1996*, http://www.museum.tv/archives/etv/U/htmlU/uspolicyt/uspolicyt.htm. The Act's provisions fall into the following general areas: radio and television broadcasting, cable television and telephone services, Internet and on-line computer services, and telecommunications equipment manufacturing. *Id.*

151. *Reno*, 521 U.S. at 858.

either *after* the committee hearings concluded or as amendments offered during the floor debate on the legislation.[152] An amendment offered in the United States Senate was the source of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet.[153]

The first provision, section 223(a), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age.[154] It provides:

> Whoever in interstate or foreign communications... by means of a telecommunications device knowingly makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication [or] knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.[155]

The second provision of the Telecommunications Act, section 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that would be available to a person under 18 years of age.[156] Section 223(d) provides:

> Whoever in interstate or foreign communications knowingly uses any interactive computer service to display to send to a specific person or persons under 18 years of age, [or] uses any interactive computer service to display in a manner available

152. *Id. See also* 141 Cong. Rec. S8087-04 (June 9, 1995) (statement of Sen. Exon) (amendment proposed by Senator James Exon (D-Neb.) in an effort to make the internet "superhighway a safe place for our... families to travel on.").

153. *Reno*, 521 U.S. at 858–59. The Supreme Court, as well as the District Court, considered the two provisions as one for purposes of evaluation and analysis. *Id.* at 859 n.25. For a discussion of the legislative history of the Act, see Kurt E. Wimmer & Cara E. Maggioni, *Congress and the Expansion of Communications Technology, in* THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS 1934–1996 195–99 (Max D. Paglin ed., Pike and Fischer, Inc. 1999).

154. 47 U.S.C. § 223(a) (2006).

155. *Id.*

156. 47 U.S.C. § 223(d).

> to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communications; or knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.[157]

Although these provisions are comprehensive and seemingly dispositive, they were subject to two affirmative defenses. The first defense dealt with individuals who take "good faith, reasonable, effective, and appropriate actions" to restrict access to minors to the prohibited communications.[158] The second defense covered those individuals who restricted access to the prohibited materials by requiring certain designated forms of proof of age, such as "requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."[159]

In a review of the constitutionality of section 223(a) and section 223(d), the Supreme Court held that "[n]otwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials," it concurred with the three-judge panel of the District Court that the statute abridged "the 'freedom of speech' protected by the First Amendment."[160]

In considering the case, the Supreme Court announced that it would pass upon the constitutionality of the CDA by analyzing three cases: *Ginsberg v. New York,*[161] *FCC v. Pacifica Foundation*[162]—two cases that have been featured prominently in the analysis found in Parts II and III—and, interestingly, *Renton v. Playtime Theaters, Inc.*, essentially a "property" case involving a municipal zoning ordinance that was designed to keep "adult" movie theaters out of residential neighborhoods.[163]

157. *Id.*
158. 47 U.S.C. § 223(e)(5)(A).
159. 47 U.S.C. § 223(e)(5)(B).
160. *Reno*, 521 U.S. at 849.
161. 390 U.S. 629 (1968).
162. 438 U.S. 726 (1978).
163. 475 U.S. 41, 43 (1986).

A. *Ginsberg* and *Pacifica Foundation* Summary and Redux

In *Ginsberg*, the Supreme Court dealt squarely with the "age" issue and held that a New York statute, prohibiting the sale to minors of materials deemed *obscene as to them but not if sold to adults*, was constitutional.[164] The Court specifically rejected the defendant's contention that "the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor."[165] The Court based its decision on the State's fundamental interest in the well-being of its youth (presumably under the age of 18),[166] and a recognition of the core principle that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[167]

However, the Court distinguished *Reno* from *Ginsberg* in four important ways. First, in *Ginsberg*, the "prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."[168] In contrast, under the CDA, neither

164. *Ginsberg*, 390 U.S. at 636–37 (noting that the "girlie picture magazines involved in the sales here are not obscene for adults."). *See also Reno*, 521 U.S. at 864.

165. *Ginsberg*, 390 U.S. at 636.

166. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002). There, the Supreme Court noted that "[t]he Court has long recognized that the Government has a compelling interest in protecting our Nation's children." *Id.* at 263. *See also* New York v. Ferber, 458 U.S. 747, 756–57, 774 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part (distinguishing child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process of pornography)).

While in general, pornography can be banned only if it is judged to be obscene, under *Ferber*, pornography showing or depicting minors can be proscribed whether or not the images are considered obscene under the definition as set forth in *Miller v. California*, 413 U.S. 15 (1973). *Ferber*, 458 U.S. at 756. In *Ashcroft v. Free Speech Coalition*, the Supreme Court considered whether the Child Pornography Prevention Act of 1996 (CPPA) abridged the freedom of speech guaranteed by the First Amendment. 535 U.S. at 239–40. *See* 18 U.S.C. §§ 2251–2260A (2006 & Supp. 2008). The Supreme Court framed the question as follows: "whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*." *Free Speech Coal.*, 535 U.S. at 240. The statute involved what the Court noted was "the new technology," and extended the federal prohibition against child pornography to sexually explicit images that *appeared* to depict minors but were, in reality, produced without using any *real* children. *Id.* at 239–41. These images—sometimes called "Cyber Porn"—were created by using adults who look like or appear to be minors or by using the technology of computer imaging. *Id.* at 239–40. The Supreme Court ruled that the CPPA was "inconsistent with *Miller* and finds no support in *Ferber*," and that Sections 2256(8)(b) and 2256(8)(d) of the CPPA were both overbroad and unconstitutional. *Id.* at 256.

167. *Reno*, 521 U.S. at 865 (citing *Ginsberg*, 390 U.S. at 639).

168. *Ginsberg*, 390 U.S. at 639.

the consent of the parents nor their participation in the communication would "avoid the application of the statute."[169] Second, while the New York statute at issue in *Ginsberg* applied only to commercial transactions,[170] the CDA contains no such limitation. Third, the New York statute coupled a definition of material that is "harmful to minors" with a requirement that the material be "utterly without redeeming social importance for minors."[171] However, the CDA failed to provide in section 223(a)(1) any definition of the term "indecent," and section 223(d) also omitted any requirement that the "patently offensive" material lack serious literary, artistic, political, or scientific value.[172] Fourth, under the New York statute, a minor is a person under the age of 17, whereas under the CDA, the statute applies to all those under 18 years.[173]

In *Pacifica Foundation*, the FCC asserted that the repetitive use of certain words that referred to excretory and sexual activities or organs "in an afternoon broadcast when children are in the audience was patently offensive" and concluded that the monologue was indecent.[174] The Supreme Court agreed, rejecting two constitutional attacks that Pacifica Foundation made on the Commission's authority: that the Commission's construction of its authority was "overly broad," and Pacifica Foundation's assertion that since the recording itself was not judged to be obscene, the First Amendment forbade *any* abridgement of the right to broadcast the monologue on the radio.[175]

In response, the Court observed that the First Amendment does not prohibit all government regulation of the content of speech.[176] As a result, the "availability of constitutional protection for a vulgar and offensive monologue that was not obscene depended on the context of the broadcast."[177] The Court further noted that "[o]f all forms of communication," broadcasting has received the most limited First

169. *Reno*, 521 U.S. at 865.

170. *Ginsberg*, 390 U.S. at 647.

171. *Id.* at 646.

172. *Reno*, 521 U.S. at 859 (citing ACLU v. Reno, 929 F. Supp. 824, 863, 871 (E.D. Pa. 1996)). Judge Buchwalter concluded that the words "patently offensive" were so vague that enforcement would violate the "fundamental constitutional principle" of "simple fairness." *ACLU*, 929 F. Supp. at 861.

173. *Reno*, 521 U.S. at 864.

174. *Pacifica Found.*, 438 U.S. at 739.

175. *Id.* at 742.

176. *Id.* at 742–43.

177. *Reno*, 521 U.S. at 866 (citing *Pacifica Found.*, 438 U.S. at 744–48).

Amendment protection.[178] This is because "the ease with which children may obtain access to broadcasts, 'coupled with the concerns recognized in *Ginsberg*,' justifie[s] the special treatment afforded indecent broadcasting."[179]

Once again, the Court outlined the differences between the order upheld in *Pacifica Foundation* and the CDA. First, the order issued by the FCC in *Pacifica Foundation* targeted a specific broadcast, which, as the Supreme Court noted directly, represented "a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium."[180] Second, the CDA contained broad categorical prohibitions that were not limited to particular times and were not subject to the independent evaluation of an agency familiar with the unique characteristics of the Internet.[181] And third, unlike the CDA, the Commission's order in *Pacifica Foundation* was not punitive.[182]

The Court recognized that the medium of radio was unique in that warnings could not "adequately protect the listener from unexpected program content."[183] In contrast, the Internet posed a more "remote" threat because there were a series of affirmative steps is required in order to access specific materials.[184]

The Supreme Court then interestingly introduced a third case into its review—*Renton v. Playtime Theaters, Inc.*[185] In *Renton*, a city zoning ordinance limited "adult entertainment" establishments [adult movie theaters] to one corner of the city constituting less than 5 percent of the city's total area.[186] The Supreme Court concluded that the ordinance was not aimed at the content of the films shown in the theaters, but rather at what the Court characterized as the "secondary effects"—such as crime and deteriorating property values—that the presence of these theaters seemed to accompany, if not spur.[187]

178. *Pacifica Found.*, 438 U.S. at 748.

179. *Reno*, 521 U.S. at 866–67 (citing *Pacifica Found.*, 438 U.S. at 749–50).

180. *Reno*, 521 U.S. at 867. However, see *infra* Section V.

181. *Reno*, 521 U.S. at 867.

182. *Id.*

183. *Id.*

184. *Id.*

185. 475 U.S. 41 (1986).

186. *Id.* at 53.

187. *Id.* at 48–49 (stating "[it] is [the] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech[.]" *Id.* at 49 (quoting Young v. American Mini Theaters, Inc., 427 U.S. 50, 71 n.34 (1976) (upholding Detroit's "Anti-Skid Row" ordinances prohibiting adult motion picture theaters and adult book stores

Once again, the Court differentiated *Renton* from its consideration of the CDA on three separate grounds. First, while the government chose to characterize its actions under the CDA as a sort of "cyberzoning" on the Internet, the Supreme Court noted that the CDA applies "broadly to the entire universe of cyberspace."[188] Second, the CDA was designed to protect certain minors from the *primary effects* of "indecent" and "patently offensive" speech, rather than any "secondary" effects of such speech.[189] And third, the CDA is a "content-based blanket restriction on speech," and thus, cannot be analyzed as a traditional form of more limited "time, place, and manner regulation."[190]

Based upon a careful review of these three foundational cases, the Supreme Court concluded that that their precedents did not require the Court to uphold the constitutionality of the CDA.[191]

B. The Supreme Court Moves to Its Analysis

In its detailed analysis, the Supreme Court first outlined the distinct differences between regulating more traditional forms of the media and regulating the Internet, including: the history of extensive government regulation of the broadcast medium,[192] the scarcity of available frequencies,[193] and the "invasive nature" of the broadcast media.[194] The Court noted that these factors were not present in cyberspace.[195] In fact, the District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[196] The District Court also specifically found that "'[a]lmost all sexually explicit images are preceded by warnings as to the content,' and cited testimony that

located within 1,000 feet of any two other "regulated uses," including theaters, book stores, liquor stores, pool halls, pawnshops, "and the like")). *Young* also provides a definition of an "adult motion picture theater" as one "presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' . . . ." and "adult book store" in substantially the same terms. 427 U.S. at 54 n.5.

188. *Reno*, 521 U.S. at 867–68.

189. *Id.* at 868.

190. *Id.* (citing *Renton*, 475 U.S. at 46).

191. *Reno*, 521 U.S. at 868.

192. *Id.* (citations omitted).

193. *Id.* (citations omitted).

194. *Id.* (citations omitted).

195. *Id.*

196. *Id.* at 869 (citing ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (finding 88). The District Court made 123 specific findings of facts.

'odds are slim' that a user would come across a sexually explicit sight by accident."[197]

The Supreme Court then focused on an interesting case, *Sable Communications of California v. Federal Communications Commission,*[198] involving what is commonly known as "dial-a-porn."[199] *Sable Communications* involved a challenge to an amendment to the Communications Act that imposed a blanket prohibition on both indecent and obscene interstate commercial telephone messages.[200] The Supreme Court held that the statute was constitutional insofar as it applied to "obscene" messages but was unconstitutional as it was applied to "indecent" messages.[201]

In arguing for the constitutionality of the amendment to the Communications Act in *Sable Communications*, the Government relied on the rationale of *Pacifica Foundation* and asserted that the ban was necessary to prevent children from gaining access to these types of messages.[202] Reflecting the view that protections of the First Amendment are not absolute and that special considerations might apply in cases of minors, the United States Supreme Court agreed and reiterated the foundational premise that "there is a compelling interest in protecting the physical and psychological well-being of minors" which could be extended to shielding minors from indecent messages that might not be judged to be obscene by adult standards.[203] However, the Court once again distinguished *Reno v. ACLU* from *Pacifica Foundation* on two now-familiar grounds: *Pacifica Foundation* did not involve a complete ban on the communication and it involved a different medium of communication.[204] The Court in *Sable Communications* explained that "the dial-it medium requires the listener to take affirmative steps to receive the communication."[205] The Court added, "[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."[206]

197. *Reno*, 521 U.S. 869 (citing *ACLU*, 929 F. Supp. at 845 (finding 88)).

198. 492 U.S. 115 (1989).

199. *Id.* at 128.

200. *Reno*, 521 U.S. at 869 (citing *Sable*, 492 U.S. at 128).

201. *Id.*

202. *Id.*

203. *Id.* (citing *Sable,* 492 U.S. at 126).

204. *Id.* (citing *Sable*, 492 U.S. at 127).

205. *Id.* (citing *Sable*, 492 U.S. at 127–28).

206. *Id.* (citing *Sable*, 492 U.S. at 128). Is this rationale still valid? Because of the rapid pace of technological change, issues presented by the existence of "Spy-Ware" or other invasive technologies might cause an unwanted image to literally "pop-up" on a

Although *Reno v. ACLU* is dated—note that it was decided in 1997 and mainly involved a "dial-up" phone service—it is most instructive that even at the early date in the development of the Internet, the Supreme Court in *Reno* seemed quite prescient in asserting that:

> This dynamic, multifaceted category of communication [the Internet] includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.[207]

The Court in *Reno* reasoned that, because of the unique nature of the Internet, with "the content on the Internet [] as diverse as human thought,"[208] there was no basis for "qualifying the level of First Amendment scrutiny" as applied to other media.[209]

C. Are Legal and Definitional Ambiguities and Constitutional Burdens Endemic to the Proposed Regulation of the Internet?

In *Reno v. ACLU*, the Supreme Court first focused on the allegations of *vagueness* and *ambiguity* in the CDA, noting that this "uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials."[210] Vagueness is considered to be a

computer, without the concurrence or actions of the computer operator—and certainly, without the knowledge or consent of parents!

207. *Reno*, 521 U.S. at 870.

208. *Id.* (citing 929 F. Supp. at 842).

209. Id.

210. *Id.* at 871–72 (distinguishing *Reno v. ACLU* from *Miller* on grounds that *Miller* contained a requirement that the proscribed material be "specifically defined by the applicable state law;" that the *Miller* definition was limited to "sexual conduct," whereas the CDA extends its reach also to include (1) "excretory activities" as well as (2) "organs" of both a sexual and excretory nature; and that *Reno v. ACLU* lacks reference to the additional prongs in *Miller*—(1) that, taken as a whole, the material appeal to the "prurient" interest, and (2) that it 'lac[k] serious literary, artistic, political, or scientific value."). The Supreme Court specifically rejected the government's contention that "material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's 'patently offensive' and 'indecent' prohibitions." *See id.* at 871 n.37. The Court also rejected the Government's contention that (1) the CDA is constitutional because it "leaves open ample 'alternative channels' of communication;"

matter of special concern for two reasons. First, the CDA is clearly content-based regulation on speech, and in this context, it presents an obvious "chilling effect on free speech."[211] Second, the CDA is a criminal statute, threatening offenders with penalties, including up to two years in prison for each potential act in violation.[212] As to the issue of the imposition of criminal penalties, the Supreme Court noted that an increased deterrent effect, which might cause speakers to remain silent on a variety of topics[213] rather than to communicate "even arguably unlawful words," coupled with the "risk of discriminatory enforcement" of vague and ambiguous regulations, "poses greater First Amendment concerns than those implicated by civil regulation . . . ."[214]

The Supreme Court discussed the requirement that a statute which regulates the content of speech must exhibit precision and must be targeted towards a clearly defined group (presumably minors) that requires special protection of the courts, lest the government "reduc[e] the adult population . . . to . . . only what is fit for children."[215] The Court concluded that:

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.[216]

In addition, the Supreme Court addressed the requirement that a statute must be "narrowly tailored" in order to avoid an "over-arching commitment" to an improper regulation of free speech.[217] The Court rejected the government's contention that prohibiting a transmission whenever one of its recipients is a minor would not

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and (2) that the "plain meaning of the 'knowledge' and 'specific person' requirements of the CDA significantly restricts its permissible applications." *Id.* at 879.

211. *Id.* at 871–72. *See also, e.g.*, Neb. Press Ass'n. v. Stuart, *427 U.S. 539* (1976).

212. *Reno*, 521 U.S. at 872.

213. Interestingly, the Supreme Court provided a partial listing of topics that might provoke adverse action under the CDA: a serious discussion about birth control, homosexuality, or the consequences of prison rape. *Id.* at 824.

214. *Id.* at 872.

215. *Id.* at 875.

216. *Id.* at 874.

217. *Id.* at 876.

interfere with protected adult-to-adult communication.[218] Because of the myriad of ways that individuals can access the Internet—the Court cited e-mail, mail exploders, newsgroups, and chat rooms—the District Court had found that, at the time of the trial, there was no existing technology that might prevent a minor from obtaining access to Internet communications without denying access to these same communications to an adult.[219]

The Court also commented that the "breadth of the CDA's coverage is wholly unprecedented."[220] "Unlike the regulations [that were] upheld in [both] *Ginsberg* and *Pacifica* [*Foundation*], the scope of the CDA was not limited to commercial speech or commercial entities."[221] The Court commented:

> Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value. Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message.[222]

Because the statute posed a content-based restriction on speech, the government faced a heavy burden to explain why a less restrictive provision would not be as effective in protecting minors from harmful materials.[223] The Supreme Court concluded that the government had not done so.[224] The Court also noted that there were many possible alternatives to the impermissible reaches of the CDA, including "tagging" of indecent materials so that parental control of materials coming into the home could be effected, making exceptions for messages with legitimate artistic or educational (medical) value, providing avenues for parental choice and decision, and even the

218. *Id.*
219. *Id.*
220. *Id.* at 877.
221. *Id.*
222. *Id.* at 877–78 (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).
223. *Reno*, 521 U.S. at 879.
224. *Id.*

possibility of regulating commercial websites in a different manner than non-commercial chat rooms.[225]

In seemingly rebuking Congress, the Supreme Court addressed the lack of any detailed findings by Congress, or the absence of any Congressional hearings addressing "the special problems" of the CDA.[226] The Supreme Court stated: "We are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all."[227] As an effective summary, the Court added: "[The CDA] would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child—a 'specific person . . . under 18 years of age'—would be present."[228]

D. What About the Affirmative Defenses? Might These "Save the CDA"?

The government mounted a two-pronged—some might say, a "last gasp"—argument in defense of the CDA, focusing on the defenses provided in section 223(e)(5).[229] Under the first defense, termed the "good faith, reasonable, effective, and appropriate actions" provision, the government contends that "tagging" provides an effective defense that "saves the constitutionality of the Act."[230] However, the government conceded that, at the time the case was heard, no such technology was present or generally available, raising strong doubts as to the "effective" argument.[231] A second defense centered around Section 223(e)(5)(B), namely the "verification defense," under which the transmitter has restricted access to the objectionable communication by requiring "the use of a verified credit card, debit account, adult access code, or an adult personal identification number."[232] As opposed to "tagging," this technology was, in fact, available in 1997.[233] However, while technologically feasible, the District Court had found that it was not economically feasible for most noncommercial speakers/transmitters to utilize such

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 880 (citing 47 U.S.C. § 223(d)(1)(a)).

229. *Id.* at 881.

230. *Id.* The "tagging defense" is based on the technology that transmitters may *encode* their indecent communications such that would indicate their objectionable content, thus permitting the receiving party (presumably parents or other adults) to block their reception with appropriate computer software.

231. *Id.*

232. *Id.* at 881, 861 n.26.

233. *Id.* at 881.

forms of verification.[234] In addition, the Supreme Court noted there still might be a problem with a minor "posing" as an adult—and the technology would not be an effective remedy against this possibility.[235] Thus, the District Court refused to rely on an unproven future technology or upon an unrealistic and unenforceable remedy.[236] The government had failed to prove that the defenses available under section 223(e)(5) would "significantly reduce the heavy burden on adult speech produced by the prohibition on offensive displays."[237]

E. The Decision

Interestingly, the government raised an additional reason for upholding the constitutionality of the CDA that had not been raised at the District Court level, namely that, in addition to protecting children, it had an "'equally significant' interest in fostering the growth of the Internet . . . ."[238] The Court characterized this interest as an assumption that the "unregulated availability of potentially 'indecent' and 'patently offensive' material on the Internet might drive countless citizens away from the medium because the risk of exposing themselves or their children to harmful material."[239]

This defense, which might be called the "Internet Abstinence" defense, was found to be unpersuasive by the Court.[240] The Court noted: "The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record indicates that the growth of the Internet has been and continues to be phenomenal."[241]

In its conclusion, the Court used rather forceful language to reaffirm its basic belief in the freedom of speech and expression guaranteed to Americans under the First Amendment—especially in light of the development of the new and exciting technology embodied in the Internet:

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere

234. *Id.*
235. *Id.* at 882.
236. *Id.*
237. *Id.* at 882.
238. *Id.* at 885.
239. *Id.*
240. *Id.*
241. *Id.*

with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[242]

V. Law and Technology after *Reno v. ACLU*

The role of the United States Supreme Court in mediating controversies in the arena of the media has been pivotal in striking the "delicate balance" between societal interests, parental concerns, and personal freedom. As can be seen, the attempt to reconcile these often competing interests has posed a difficult problem.

The three cases highlighted thus far in this study, *Burstyn v. Wilson, FCC v. Pacifica Foundation,* and *Reno v. ACLU*, demonstrate how the United States Supreme Court has drawn important distinctions based on the unique factual circumstances of each case. Yet, all have been the object of significant societal debate and sometimes sharp division within the Court itself at the time the cases were decided. A brief summary review is in order.

Burstyn demonstrates how the power of the state to limit speech—in this case, a controversial film seen as offensive to the politically powerful Roman Catholic Church and its scion, Francis Cardinal Spellman—based upon a finding that the film was "sacrilegious," had crossed the line of permissible state action.[243] Thus, the decision of the New York Board of Regents, a state administrative body, was struck down on constitutional (First Amendment) and due process (Fourteenth Amendment) grounds.[244]

In *Pacifica Foundation*, the Supreme Court immersed itself into what today might be called the "culture wars," by upholding a determination of a federal administrative agency (the FCC) that certain words, which while suitable (constitutionally) for adult-hearing, were not suitable—and were thus not constitutionally protected—for broadcast to minors.[245] In this case, the medium was the radio.[246]

Finally, in *Reno v. ACLU*, the Supreme Court once again was called upon to draw a "bright line" of sorts. Distinguishing the

242. *Id.*
243. *See supra* Part II.
244. *Id.*
245. *See supra* Part III.
246. *Id.*

factual circumstances and the constitutional principles from *Pacifica Foundation*—where the Supreme Court had found that the presence of the radio was truly pervasive, with the offensive words of the Carlin monologue literally invading an individual's privacy—the Supreme Court in *Reno v. ACLU* found that the Internet was indeed a very different medium from the radio.[247] Thus, the protections of the First Amendment were of special import when considering attempts by the state to regulate its content.

In striking down a federal statute that attempted to ban indecent "messages" that had not been deemed to be obscene, the United States Supreme Court relied upon the rationale that through *technology*, parents could effectively control the contents of messages coming into their homes.[248] Because of its unique structure and pervasive importance, the Internet was entitled to special protection from government intervention and censorship.[249] As the District Court found, "[t]he content of the Internet is as diverse as human thought."[250] As a result, the Supreme Court concluded that its precedents provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[251]

But, was the Supreme Court correct? Would facts prove that the Supreme Court itself did not understand the true nature of the "Internet phenomenon?" Can parents or other adults be guaranteed that they will have effective control over what comes into their homes, thereby alleviating the necessity or rationale for government intervention? Would the same principles and distinctions apply to Congress' attempt to restrict a minor's access to view "objectionable websites" or to be protected from "harmful images" found on a computer when accessing the Internet in a public library?

On one issue, the Supreme Court certainly "got it right." In *Reno v. ACLU*, the Court stated that the Internet could hardly be considered a "scarce expressive commodity."[252] The Supreme Court noted that the Internet provides "relatively unlimited, low-cost capacity for communication of all kinds."[253] In 1997, the government had estimated that "[a]s many as 40 million people [in the United

247. *See supra* Part IV.B.

248. *See supra* Part IV.C–E.

249. *See supra* Part IV.E.

250. Reno v. ACLU, 521 U.S. 844, 870 (1997) (citing ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996) (finding 74)).

251. *Id.*

252. *Id.*

253. *Id.*

States] use the Internet today, and that figure is expected to grow to 200 million by 1999."[254] To properly contextualize the previous statement, world Internet users have grown from 360,985,492 in December 2000 to 1,668,870,408 in June 2009, more than quadrupling over an eight-year period.[255] It was certainly true, as the District Court found that "the content on the Internet is as diverse as human thought."[256]

A. Congress Again Acts

We now turn to congressional actions in response to *Reno v. ACLU*. We do so, because in the case of both statutes, the underlying premise of Congressional action was *technology*.

Professor Martha McCarthy has done extensive research on the topic of Internet censorship.[257] Professor McCarthy has noted that there are four primary ways by which children may gain access to inappropriate materials on the Internet: various "commercial actors" may transmit materials to children through cyberspace; "child predators either send visual materials or talk with children in ways considered harmful"; minors may intentionally locate illicit sites; and minors find such sites accidentally.[258]

Subsequent to the decision of the Supreme Court in *Reno v. ACLU*, Congress once again entered the fray and enacted two major pieces of legislation in order to deal specifically with issues relating to minors, the Internet, and certain "objectionable materials" that might or might not be considered as pornography, but which might be considered as harmful or as inappropriate.[259] We will summarize two important Supreme Court cases which arose out of litigation concerning these statutes and then move to some concluding comments on the core issue of technology—through the use of Internet filters—as guarantor of effective parental and societal control over objectionable materials reaching minors via the Internet. In looking at the issue of technology, we will raise one final question:

254. *Id.* (citing *ACLU*, 929 F. Supp., at 831 (finding 3)).

255. Internet World Statistics, *The Internet Big Picture*, http://www.internetworldstats.com/stats.htm (last visited Sept. 16, 2009).

256. *Reno*, 521 U.S. at 870 (citing *ACLU*, 929 F. Supp. at 842 (finding 74)).

257. *See* Martha McCarthy, *The Continuing Saga of Internet Censorship: The Child Online Protection Act*, 2005 BYU EDU. & L.J. 83 (2005). We are indebted to Professor McCarthy for providing an informative backdrop, as well as a logical construction, to the statutory and case materials found in Part V of this study.

258. *Id.* at 84.

259. *See infra* Part V.B, V.D.

Should "filter technology" ultimately prove unsuccessful, unworkable, or overly burdensome in protecting minors, or should the Internet prove to be beyond the scope of parental or adult control because of "filter bypass" techniques or some other counter-technology, might not these factors bolster the government's persistent contention that legislation and not technology is required to deal with this recurring and important issue? Might a failure of technology provide the justification for governmental action to assume the role of censor regarding this or other future "new media"?

B. Child Online Protection Act

In enacting the Child Online Protection Act ("COPA")[260] in 1998, Congress was clearly attempting to resolve some of the CDA's major constitutional defects by significantly narrowing its intended scope. COPA prohibits *content harmful to minors* (defined as those under seventeen years of age)[261] from "being distributed for commercial purposes through the Internet."[262] The statute's "commercial limitation" was defined in relation to individuals "engaged in the business of making such communications" and required that any such person devote "time, attention, or labor to such activities" as part of their trade or business,[263] so as to avoid casual, inadvertent, or non-commercial applications. As an additional limitation, COPA specifically targeted online communication that is publicly accessible over the Internet. However, COPA was not "all-media or source encompassing," and did not target all modes of online communication.[264] For example, COPA specifically excluded e-mail.[265] COPA imposed both criminal and civil penalties on those who knowingly made available such materials in interstate or foreign

260. 47 U.S.C. § 231 (2006).

261. 47 U.S.C. § 231(e)(7).

262. McCarthy, *supra* note 257, at 86 (citing 47 U.S.C. § 231(a)(1)(d)(1)).

263. 47 U.S.C. § 231(e)(2).

264. McCarthy, *supra* note 257, at 87 n.29 (citing 47 U.S.C. § 231(e)(1)). The prohibited material must be placed on the World Wide Web "using hypertext transfer protocol or any successor protocol."

265. 47 U.S.C. § 231(e)(4). The Center for Democracy and Technology notes, however, that materials such as movies and television programs when disseminated through popular websites were also covered by the Act. *See* Center for Democracy and Technology, *Child Online Protection Act (COPA)*, http://www.cdt.org/speech/copa (last visited Aug. 31, 2009).

commerce;[266] however, the imposition of criminal penalties was the most important and controversial provision. Similar to the CDA, which had been found defective constitutionally, COPA provided an affirmative defense to those who restricted access to prohibited materials by reasonable measures "that are feasible under available technology," such as requiring the use of a credit card, or an adult identification number, or a digital certificate that verifies the age of the potential user.[267]

COPA defined the term, *materials harmful to minors,* as any communication that:

> (A) the average person, applying contemporary community standards . . . and with respect to minors is designed to appeal to . . . the prurient interest; (B) depicts, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[268]

Unsurprisingly, litigation challenging the constitutionality of COPA was initiated on October 22, 1998.[269] The litigation would reach the United States Supreme Court on two separate occasions and would stretch for more than a decade until January 21, 2009, when the United States Supreme Court refused to hear any further appeals of the lower court decisions—an action effectively killing the bill.[270]

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266. *See* 47 U.S.C. § 231(a). Criminal penalties included a $50,000 fine and six months in prison.

267. 47 U.S.C. § 231(c)(1).

268. 47 U.S.C. § 231(e)(6). The statute thus attempted to incorporate the most salient points of both *Miller* and *Ginsburg* in order to assuage any constitutional challenges and to clarify the reaches of the Act.

269. *See* ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).

270. *See* Scott Nichols, *COPA Child-Porn Law Killed*, PCWORLD, Jan. 22, 2009, http://www.pcworld.com/article/158131/copa_childporn_law_killed.html. *See also* Sean Alfano, *Judge Puts Porn Access Burden on Parents*, CBSNEWS.COM, Mar. 22, 2007, http://www.cbsnews.com/stories/2007/03/22/tech/main2595647.shtml. The author quotes CBS technical analyst Larry Magid as saying: "I think the judge gets it that the law would have a chilling effect on free speech of adults while not protecting children. The law could have shut down sites that are not only legal, but potentially beneficial, such as sites that promote sexual health." Interestingly, the Center for Democracy and Technology had noted that the Act would not have effectively prevented children from seeing

The detailed procedural history of the case is most interesting. In 1999, the United States District Court for the Eastern District of Pennsylvania granted a preliminary injunction against enforcement of the Act, deciding that COPA was substantially likely to place an impermissible burden on some forms of constitutionally protected expression.[271] The District Court did not find evidence that imposing criminal penalties on distributors of the targeted Web materials constituted the least restrictive means available to achieve the government's goal of restricting minors' access to harmful communication on the Internet.[272] On appeal, the Third Circuit Court of Appeals held that the District Court had not abused its discretion in granting the preliminary injunction.[273] However, the Third Circuit chose to employ a different rationale than the District Court in order to justify the award of the injunction. The Court of Appeals concluded that COPA's use of "community standards" made the law unconstitutionally overbroad because distributors of Web materials would potentially be required to gear messages to the most conservative members of the community in order to satisfy this requirements of the Act.[274]

The United States Supreme Court granted certiorari and rendered what would be its first COPA decision in 2002, in the case colloquially known as *Ashcroft I*.[275] The Supreme Court concluded that COPA's use of "community standards" in order to identify harmful materials did not in itself render the law unconstitutionally overbroad.[276] The Supreme Court left the injunction in place, but remanded the case to the District Court for reconsideration on other grounds.[277]

Upon remand, the Third Circuit Court of Appeals reevaluated the District Court's entry of an injunction against the enforcement of COPA "in light of the concerns expressed by the Supreme Court."[278] Rather than focusing solely on the "community standards" provision of COPA, the Court "consider[ed] the other aspects of the District

inappropriate materials originating from *outside* the United States which are available from other internet resources such as chat rooms or conventional e-mail. Center for Democracy and Technology, *supra* note 265.

271. *ACLU*, 31 F. Supp. 2d at 495.

272. *Id.* at 497.

273. ACLU v. Reno, 217 F.3d 162, 181 (3d Cir. 2000).

274. *Id.* at 166.

275. Ashcroft v. ACLU, 535 U.S. 564 (2002).

276. *Id.* at 584–85.

277. *Id.* at 586.

278. ACLU v. Ashcroft, 332 F.3d 240, 243 (3d Cir. 2003).

Court's analysis" and again affirmed the injunction.[279] This time around, the Court focused on the argument made by the ACLU that there were less restrictive ways to achieve the government's goal—mainly through the use of filtering devices—and that the government had failed to prove that these alternative methods were not effective.[280]

The Court of Appeals analyzed the case under a *strict scrutiny standard*[281] and concluded that COPA likely violated the First Amendment on two familiar grounds: that the statute was not "narrowly tailored" and that the statute was overly broad.[282] First, in applying the strict scrutiny standard, the Court of Appeals held that COPA would probably not be considered "narrowly tailored" to serve a compelling government interest because the Act was not the least restrictive means that could be employed to prevent minors from gaining access to harmful materials on the Internet.[283] Second, the court of appeals reasoned that COPA would likely be found "overbroad" because it placed significant burdens on the dissemination of protected speech on the Internet and on adults' constitutionally protected access to such speech.[284]

The government once again appealed the decision of the Third Circuit to the United States Supreme Court, in a case that has become known as *Ashcroft II*.[285]

C. *Ashcroft II*

For a second time, the United States Supreme Court would address the constitutionality of COPA.[286] In *Ashcroft II*, decided in 2004, the Supreme Court affirmed the Third Circuit's conclusion that the District Court had not abused its discretion by entering the preliminary injunction.[287] However, the Supreme Court would significantly narrow the ruling of the Third Circuit.[288]

A five-Justice majority on the United States Supreme Court focused on the likelihood that the statute unconstitutionally burdens

279. *Id.*
280. *Id.* at 261–64.
281. *Id.* at 251.
282. *Id.* at 271.
283. *Id.* at 251.
284. *Id.* at 266.
285. Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656 (2004).
286. *Id.* at 659–60.
287. *Id.* at 660–61, 665.
288. *Id.* at 665.

"some speech that is protected for adults."[289] Professor McCarthy commented that, under these circumstances, "[t]he Court reasoned that it was important to let the injunction stand pending a full trial because of the potential harm that might result in chilling protected speech that could result from prosecution of distributors of Internet materials under COPA."[290] The Supreme Court embraced and reiterated its core First Amendment jurisprudence and concluded that COPA likely violated the First Amendment because it imposed a content-based restriction, noting that "the Constitution demands that content-based restrictions on speech be presumed invalid."[291] The Supreme Court also stated that the Government must bear the burden of proving the constitutionality of COPA.[292]

As the Court noted:

> In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished.[293]

While keeping the injunction in place, the Supreme Court suggested that the key question on remand to the District Court would be "whether the challenged regulation is the least restrictive means among available, effective alternatives."[294] Although the Supreme Court noted that Internet filters would be less restrictive than the criminal sanctions enacted in COPA, the Court determined that a remand to the District Court was necessary in order to

289. *Id.* at 665 (citing ACLU v. Reno, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999)).

290. McCarthy, *supra* note 257, at 89.

291. *Ashcroft II*, 542 U.S. at 660.

292. *Id.* (citing United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 (2000). In *Playboy Entm't Group*, the Supreme Court noted that a content-based regulation will be upheld only if it passes judicial muster under a strict scrutiny test. *Playboy*, 529 U.S. at 813. Thus, a law that required cable operators to limit "sexually oriented" programs to after 10 p.m. was held invalid because a less restrictive alternative existed enabling individual households to block undesired channels. *Id.* at 803.

293. *Ashcroft II*, 542 U.S. at 666.

294. *Id.*

determine the effectiveness and reliability of such filtering software.[295] The Supreme Court also asked the District Court to determine whether further evidence might be adduced on the relative efficacy of any alternatives to the statute.[296] In remanding the case for further proceedings to the District Court, the Supreme Court indicated that it might be possible for the government to meet its burden of showing that Congress had constitutionally accomplished its goal of safeguarding children from harmful materials via the Internet and that COPA was the least restrictive alternative available to accomplish Congress' goal.[297] However, the Supreme Court raised grave doubts about this eventuality.[298]

The majority in *Ashcroft II* set the parameters for the evaluation of COPA and, by implication, for future attempts to regulate the transmission of "harmful materials" via the Internet. In so doing, the Court expressed its clear preference for technology over both regulation and legislation. The Supreme Court recognized that "it is incorrect . . . to say that filters are part of the current regulatory status quo."[299] However, the Supreme Court also rejected the argument that Congress was not authorized to mandate filtering software through legislation, stating that Congress "undoubtedly may act to encourage the use of filters."[300] The Court also noted

> [t]hat filtering software may well be more effective than COPA is confirmed by the findings of the Commission on Child Online Protection, a blue-ribbon Commission created by Congress in COPA itself. Congress directed the Commission to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet.[301]

What was at the core of this belief? The Supreme Court noted that filters and filtering technology may be more effective than the imposition of criminal penalties for several reasons. First, filters "impose selective restrictions on speech at the receiving end, not

295. *Id.* at 668–69.
296. *Id.* at 672–73.
297. *Id.*
298. *Id.*
299. *See id.* at 669.
300. *Id.*
301. *Id.* at 668.

universal restrictions at the source."[302] Second, while filters may be successful in protecting minors from harmful or inappropriate materials, adults may continue to access constitutionally protected speech by disconnecting, disabling, or simply turning off the filter.[303] Third, the majority of the Supreme Court recognized that technology had substantially changed since the District Court made its initial findings of fact, so that filters were much more reliable and were less likely to either *overblock* or *underblock* web sites.[304] Finally, requiring the use of a credit card to access the Internet may not be as successful in keeping minors away from impermissible sites as would filters, since, in fact, some minors possess such cards or may have access to them in their own names.[305]

Interestingly, Professor McCarthy noted that the Court in *Ashcroft II* was also not persuaded by the government's argument that "COPA's application to only *commercial communication* reduced the law's substantial constitutional defects."[306] The Court could find no legal justification for this distinction. In addition, the majority recognized that the legal landscape and factual context had also substantially changed since the case was first filed because Congress had enacted two Internet-related federal statutes in the interim—perhaps reducing the need for a statute as broad and encompassing as COPA.[307]

Congress had enacted a prohibition on adopting misleading domain names in order to prevent web site owners from essentially disguising pornographic sites, thus making it more difficult for parents to exercise their own independent judgment as to the suitability of the site.[308] In addition, Professor McCarthy noted that Congress had also enacted a law creating a second-level Internet domain, "*kids.us*," which had content that is restricted to appropriate material for minors under age 13.[309] Thus, the Court reasoned, the justification for COPA's criminal sanctions may not be as great as when the law was enacted in 1998 since the rapid pace of development of new

302. *Id.* at 667.
303. *Id.*
304. McCarthy, *supra* note 257, at 90.
305. *Ashcroft II*, 542 U.S. at 657.
306. McCarthy, *supra* note 257, at 91 (emphasis added).
307. *Id.* at 90.
308. 18 U.S.C. § 2252B (2006).
309. McCarthy, *supra* note 257, at 91 n.68 (citing Dot Kids Implementation and Effectiveness Act of 2002, 47 U.S.C. § 941 (2006).

technologies and safeguards might in themselves be sufficient to restrict access by minors to specific materials deemed "harmful."[310]

The Supreme Court once again remanded the case to the district court for a trial,[311] which commenced on October 23, 2006.[312] Predictably, district court Judge Lowell A. Reed once again enjoined enforcement of COPA, striking down the Act on constitutional grounds.[313] Judge Reed noted that, "perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection."[314] The government again appealed, but, on July 22, 2008, the Third Circuit upheld its 2007 decision, this time under the name of *ACLU v. Mukasey*.[315] Additionally, as noted earlier, on January 21, 2009, the Supreme Court refused to hear a further appeal of the circuit court's decision, effectively killing the bill—this time, presumably, for good![316]

D. The Children's Internet Protection Act

A second statute, the Children's Internet Protection Act ("CIPA"), was signed into law by President Bill Clinton in 2000 as a part of an omnibus spending bill.[317] The final version of the bill passed the Senate and House of Representatives on December 15, 2000, and was signed by the President on December 21, 2000.[318] This Act, under the original sponsorship of Senator John McCain of

310. *Ashcroft II*, 542 U.S. at 663.

311. *Id.* at 673.

312. ACLU v. Gonzalez (*Gonzales*), 478 F. Supp. 2d 775, 779 (E.D. Pa. 2007). Interestingly, in preparation for the trial, pursuant to Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure, the Department of Justice had issued subpoenas to various search engine operators in order to obtain Web addresses and records of Internet searches as a part of a study undertaken by a government witness in support of the law's constitutionality. *See* Gonzales v. Google, Inc., 234 F.R.D. 674, 679 (N.D. Cal. 2006). All parties complied except for Google, which challenged the subpoenas. *Id.* The district court limited the subpoena to a sample of URLs in Google's database, but refused to support the request for information on searches conducted by Google users. *Id.* at 688. *See also* Posting of Nicole Wong to Official Google Blog, http://googleblog.blogspot.com/2006/03/judge-tells-doj-no-on-search-queries.html (Mar. 17 2006, 18:00 PST).

313. *Gonzales*, 478 F. Supp. 2d at 777–78.

314. *Id.* at 821.

315. ACLU v. Mukasey, 534 F.3d 181, 206–07 (3d Cir. 2008).

316. Mukasey v. ACLU, 129 S. Ct. 1032, 1032 (2009). *See also* Scott Nichols, *COPA Child-Porn Law Killed*, PC WORLD, Jan. 22, 2009, http://www.pcworld.com/article/158131/copa_childporn_law_killed.html.

317. Child Stop – childstop.com, Children's Internet Protection Act, http://www.childstop.com/childrens_internet_protection_act.html (last visited Sept. 28, 2009).

318. *Id.*

Arizona, in contrast to the CDA, focused on *recipients* rather than the *senders* of Internet transmissions.[319] The Act was designed to address "the problems associated with availability of Internet pornography in public libraries."[320] The CIPA required public libraries and school districts that received federal technology funds to enact Internet safety policies for minors that included the use of filtering measures to protect children from access to images that are "harmful to minors."[321] The Supreme Court noted that Congress had become increasingly concerned that the E-Rate Program ("E-Rate") and Library Services and Technologies Act ("LSTA") programs were in fact "facilitating access to illegal and harmful pornography."[322]

Interestingly, the law did not specify any particular technology or type of filter that had to be used by the recipients. The statute simply defined a "technology protection measure" as a "specific technology that blocks or filters Internet access to materials covered by" the CIPA.[323] In addition, and perhaps in response to concerns raised about denying access to materials that would be suitable for adults, the Act permits the library to "disable" the filter in order to "enable access for bona fide research or other lawful purposes."[324]

Once again, as might have been anticipated, the Act was challenged on constitutional grounds by a group of library associations, patrons, web site publishers, and civil liberties groups.[325] The District Court for the Eastern District of Pennsylvania ruled that

319. 47 U.S.C. § 254 (2006 & Supp. 2008).

320. United States v. Am. Library Ass'n (*Am. Library II*), 539 U.S. 194, 198–99 (2003).

321. 47 U.S.C. § 254(h)(5)(B). For a detailed discussion of CIPA requirements, see Federal Communications Commission (Consumer & Government Affairs Bureau), *Children's Internet Protection Act*, http://www.fcc.gov/cgb/consumerfacts/cipa.html (last visited July 10, 2009). It is interesting to note the requirements of the CIPA:

> Schools and libraries subject to CIPA are required to adopt and implement a policy addressing: (a) access by minors to inappropriate matter on the Internet; (b) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (c) unauthorized access, including so-called "hacking," and other unlawful activities by minors online; (d) unauthorized disclosure, use, and dissemination of personal information regarding minors; and (e) restricting minors' access to materials harmful to them.

Id.

322. *Am. Library II*, 539 U.S. at 200 (citing S. Rep. No. 105-225, at 5 (1998)).

323. *Id.* at 201 (citing 47 U.S.C. § 254(h)(7)(I)).

324. *Id.* (citing 20 U.S.C. § 9134 (f)(3) (2006); 47 U.S.C. § 254 (h)(6)(D)).

325. Am. Library Ass'n v. United States (*Am. Library I*), 201 F. Supp. 2d 401(E.D. Pa. 2002).

the CIPA was "facially unconstitutional" and enjoined the government from withholding federal assistance because of a failure of a recipient of federal funding to comply with the various provisions of the Act.[326] In so doing, the district court held, *inter alia*: that Congress had exceeded its authority under the Spending Clause,[327] because any public library that would comply with the conditions found in the CIPA will necessarily violate the First Amendment;[328] that the CIPA filtering software constitutes a content-based restriction on access to a "public forum" that would be subject to a strict scrutiny analysis;[329] and that, although the government had a compelling interest in preventing the dissemination of obscenity, child pornography, or materials harmful to minors, the use of software filters was not narrowly tailored to further that interest.[330]

On appeal, the Supreme Court, in *United States v. American Library Association*, disagreed with the district court, in an opinion that was authored by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, and Thomas.[331] Justices Kennedy and Breyer filed separate concurring opinions.[332] The Supreme Court reiterated its long held view that it was certainly within the power of Congress to attach reasonable conditions to the receipt of federal funds in order to further its policy objectives, so long as the conditions imposed do not abridge constitutional rights or "induce" the recipient to "engage in activities that would themselves be unconstitutional."[333]

In reaching its decision to uphold the constitutionality of CIPA, the Supreme Court engaged in a careful analysis of the "societal role" of libraries, and noted that, in order to "fulfill their traditional missions of facilitating learning and cultural enrichment, public libraries must have broad discretion to decide what materials to provide to their patrons."[334] The Court noted that, within broad

326. *Id. at* 495.

327. "Congress shall have the power to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States." U.S. CONST. art. I, § 8, cl. 2.

328. *Am. Library I*, 201 F. Supp. 2d at 453.

329. *Id.* at 454 (citing United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 813 (2000) ("[A] content-based speech restriction . . . can only stand if it satisfies strict scrutiny.")).

330. *Id.* at 479.

331. 539 U.S. 194 (2003).

332. *Id.* at 214–15.

333. *Am. Library II*, 539 U.S. at 203.

334. *Id.* at 195. *See also* Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (holding that a public television station debate for congressional candidates from

limits, "when the government appropriates funds to establish a program[,] it is entitled to define the limits of that program."[335] The Court stated that the CIPA does not "penalize" libraries that chose not to install such filtering software, or deny to them the right to provide their Internet patrons with unfiltered access to the Internet.[336] Rather, "CIPA simply reflects Congress' decision not to subsidize their doing so."[337]

Then, from a constitutional point of view, the Supreme Court declined to apply "heightened judicial scrutiny" in reviewing the statute, noting that heightened scrutiny would be incompatible with the "broad discretion" that public libraries must have in order to consider content in making acquisition decisions.[338] The Court emphasized that a public library is not creating a public forum when it acquires Internet terminals.[339] Rather, a library provides Internet access in order to "facilitate research, learning, and recreational pursuits" and that a "public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves . . . ."[340] The Court reasoned that, since libraries can constitutionally exclude pornography from their print collections without being subjected to heightened judicial scrutiny, they should similarly be able to block online or Internet pornography.[341] Further,

major parties or those who have demonstrated strong popular support is not a "public forum"); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (a requirement that the NEA consider standards of "decency and respect for the diverse beliefs and values of the American public" when deciding whether to make grants was held to be facially valid). In both cases, the Supreme Court held that the government had broad discretion to make content based judgments in deciding what private speech would be made available to the public.

In his concurring opinion, however, Justice Breyer argued that while "strict scrutiny" should not be required, he would apply a "heightened scrutiny" analysis as the Court has utilized in other cases where speech-related restrictions had been examined. *Am. Library II*, 539 U.S. at 216 (Breyer, J., concurring). Justice Breyer is also clear about the method of analysis the Supreme Court should undertake in such cases. According to Justice Breyer, the Court must ask "whether the harm to speech-related interests is *disproportionate* in light of both the justifications [for the governmental action] and the potential alternatives;" it must consider the *legitimacy* of the objective of the statute or administrative rule; and "whether there are other, *less restrictive ways* of achieving that objective." *Id.* at 217–18 (Breyer, J., concurring).

335. *Am. Library II*, 539 U.S. at 211 (plurality opinion).

336. *Id.* at 212.

337. *Id.*

338. *Id.* at 205.

339. *Id.*

340. *Id.* at 206

341. *Id.* at 208, 205.

"[i]nternet access in public libraries is neither 'traditional' nor a 'designated' public forum."[342]

The Court rejected the contention that requiring filtering software "distort[s] the usual functioning of public libraries" by imposing viewpoint-based restrictions on a public library.[343] The Court distinguished CIPA from the factual circumstances presented in *Legal Services Corp. v. Velazquez,* where the Court had stated that Legal Services Corp. must remain free of *any* conditions attached by benefactors to the use of any donated funds.[344] The Court in *American Librasry Ass'n* noted that, in contrast to lawyers representing a client in a welfare dispute with the government, libraries have "no comparative role that pits them against the government."[345]

Finally, the Court addressed the contention that requiring filtering software would prevent adult library patrons from gaining access to some constitutionally protected expression rights.[346] In his concurring opinion, Justice Breyer noted that the statute contained an important exception that limited the "speech-related harm."[347] Given that the technology allowed filters to be disabled for an adult patron, the Act allows libraries to "permit any adult patron access to an 'overblocked' Web site. The adult patron need only ask a librarian to unblock the specific Web site, or alternatively, ask the librarian, 'Please disable the entire filter.'"[348]

342. *Id.*

343. *Id.* at 212.

344. 531 U.S. 533, 548–49 (2001).

345. *Am. Library II*, 539 U.S. at 213.

346. *Id.* at 208–09.

347. *Id.* at 219 (Breyer, J., concurring).

348. *Id.* The issue of "unblocking" proved to be rather vexatious—and important. Chief Justice Rehnquist had noted that

> [a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or [at least in the case of adults] disable the filter.

Id. at 209 (plurality opinion). The FCC subsequently instructed libraries complying with CIPA to implement a procedure suitable for unblocking the filter upon a request by an adult. FCC Order 03-188 (July 24, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-188A1.pdf. The actual text of the Act authorized libraries and other institutions to disable the filter on request for "bona fide research or other lawful purpose." 20 U.S.C. § 9134(f)(3). Thus, an adult was required to present some form of justification for the request. The Supreme Court, however, adopted the interpretation suggested by the Attorney General that libraries would be required to adopt an *adult use*

In summation, Justice Kennedy wrote:

> The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling .... Given this interest, and the failure to show that adult library users' access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.[349]

A careful reading of both *Ashcroft I* and *II,* in conjunction with *American Library Association,* reveals that the Supreme Court has placed great weight on the ability of technology to assuage any constitutional concerns.

VI. Implications and Tentative Conclusions

Recently, several applications of the policy debate occurring within the United States have developed internationally. These disputes may directly impact on the question of Internet restrictions both within the United States and in the international arena.

A. International Implications

To most observers, it is obvious that the paradigm of media assessment has shifted dramatically in recent years towards the Internet and away from more traditional means of communications of speech such as the radio and film—the media which spurred the constitutional conversations and controversies found in *Burstyn* and *Pacifica Foundation.*

Somewhat prescient in their assessment of the trajectory of the Internet's growth in the United States, the Supreme Court, however, could have not predicted the rapid explosion in world Internet use. Twenty countries, including China, the United States, India, and Russia, account for nearly seventy-seven percent of all world Internet users, leaving 226 countries accounting for the remaining twenty-three percent of Internet use.[350] China and Russia's rate of growth in

policy for unblocking the Internet without a requirement that the library inquire about the user's reasons for the request to disable the filter. *Am. Library II,* 539 U.S. at 209. Parenthetically, it is interesting to note that the Supreme Court added, perhaps somewhat wryly: "The Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment." *Id.*

349. *Am. Library II,* 539 U.S. at 215 (Kennedy, J., concurring).

350. Internet World Stats, *Top 20 Countries with Highest Numbers of Internet Users,* http://www.internetworldstats.com/top20.htm (last visited Sept. 18. 2009).

Internet users for the same period is over 1,000 percent each, while the U.S.'s growth is 138 percent.[351] However, the percent of the population with access to the Internet is seventy-four percent in the United States, with twenty-seven percent and twenty-two percent in Russia and China, respectively.[352] With only less than a quarter of its population having access to the Internet, China still represents the largest world user, followed by the United States. Regarding global monthly average use, Nielsen Online reports that users spend thirty-eight hours per month on their personal computers and one hour per web surfing session, resulting in visits to 1,591 pages per person per month.[353] Technology also makes it possible to track the flow of data around the world through the Internet. The *Internet Traffic Report* reports on a world map the speed and reliability of connections, by world region, through an index between zero and 100 (the higher the index, the faster and more reliable the connection in that region).[354]

In the context of world Internet use, there is a growing debate regarding the intentions of the Chinese government, who are proactively attempting to limit access to the Internet on "policy" grounds eerily similar to the rationale offered in *Burstyn*. The implications are truly staggering because, as noted above, there are as many as 300 million Chinese internet users and Internet use is on the rise.[355] Interestingly, in June 2009, the Chinese government accused Google's English-language world-wide search engine of spreading "vulgar content" (recall the "sacrilegious" standard proffered in *Burstyn*) and indicated that the Chinese government had carried out "punishment measures."[356] Malcolm Moore, a reporter for a British newspaper, has raised concerns about the Chinese action and indicated that Google had been repeatedly blocked in China for actions that were "upsetting to the regime."[357] The first actions occurred as early as 2002.[358] In blocking Google, an official from the Chinese Foreign Ministry stated, "I want to stress that Google China

351. *Id.*

352. *Id.*

353. *Nielsen Online Global Index Chart*, http://www.nielsen-online.com/resources.jsp?section=pr_netv (last visited Sept. 10, 2009).

354. *See Internet Traffic Report*, http://www.internettrafficreport.com (last visited Sept. 10, 2009).

355. *Top 20 Countries with Highest Numbers of Internet Users*, *supra* note 350.

356. Malcolm Moore, *'Vulgar' Google Blocked by China,* DAILY TELEGRAPH (London), June 26, 2008, at 21.

357. *Id.*

358. Danny Sullivan, *China's Great Wall Against Google and AltaVista*, SEARCH ENGINE WATCH, Sept. 16, 2002, http://searchenginewatch.com/2165031.

is a company operating within China to provide Internet search services and it should strictly abide by Chinese laws and regulations."[359] The government essentially accused Google of "spreading pornography"—although the article speculated that the "block could be linked to competition with the Chinese internet search engine, Baidu."[360] Jeremy Goldkorn, the founder of *Danwei*, a website that analyzes the Chinese media, indicated that the order to ban Google "had probably been vaguely communicated to internet companies" in China.[361]

In light of the actions of the Chinese government, the Obama administration, through the interventions of Gary Locke, U.S. Commerce Secretary, and Ron Kirk, the U.S. Trade Representative, immediately lodged a formal protest against the Chinese government over its plans to require that all computers in China be equipped with computer software that would block access to certain websites.[362] The Chinese government maintained that the filtering software, known as *Green Dam-Youth Escort*, was designed to block pornography and other "unhealthy information."[363] In rejecting the Chinese contentions, Kirk noted that "[p]rotecting children from inappropriate content is a legitimate objective, but this is an inappropriate means that is likely to have a broader scope"—raising the larger question of "whether the software would lead to more censorship of the Internet in China."[364] Loretta Chao, of the *Wall Street Journal*, noted that "[t]he software, which the government says was designed to filter out pornography and other contents inappropriate for children, has been found by researchers to be capable of filtering political content as well. It would add an extra layer to China's wide-reaching methods of regulating Internet use."[365] The ban, introduced on short notice, was also challenged on grounds that it might violate World Trade Organization rules because companies, such as Hewlett-Packard Co., a U.S. corporation, and

359. Moore, *supra* note 356.

360. *Id.*

361. *Id.*

362. Saul Hansell, *U.S. Asks China to Rescind Edict Requiring Web Filters*, INT'L HERALD TRIB., June 24, 2009, at A6, *available at* http://www.nytimes.com/2009/06/25/world/asia/25censor.html.

363. *Id.*

364. *Id.*

365. Loretta Chao, *U.S. Urges China to Revoke PC Software Rule; Beijing's Order to Pre-Install Web Filters on Computers Set to Take Effect on July 1[2009]*, GLOBE AND MAIL (Toronto), June 25, 2009, at B11.

Dell Inc.-Lenovo Group Ltd. of China, were given only six weeks' notice to comply with its terms.[366]

Ironically, an American firm, Solid Oak Software, claims that Green Dam includes stolen copyrighted code from one of its proprietary products, and has launched legal action.[367] Experts quoted in an *Economist* article stressed the more nefarious interpretation of the ban, rejecting the Chinese contention that Green Dam was designed to protect young people from "unhealthy" and "poisonous" pornographic and violent content, and instead noting that "Michigan experts found that it also scans text for 'politically sensitive' phrases."[368] As of July 2009, the Chinese government indicated it was rethinking its policy.[369]

Beyond China's position on the fundamental right of nations to require filters in search engines like Google or Bing, the growing threat of *cyberwar* attacks that could wreak havoc on computer systems and the Internet has also resulted in a heated dispute between Russia and the United States. Russia is proposing an international treaty similar to the one negotiated for chemical weapons and has pressed for this approach, while the United States argues that a treaty is unnecessary, pushing instead for improved cooperation among international law enforcement groups.[370] As of July 2009, an Internet denial-of-service attack aimed at twenty-seven American and South Korean government agencies and commercial websites jammed more than a third of the websites for a period of at least five days.[371] South Korean officials proceeded to accuse North Korean military or intelligence agents of being responsible for the attack in retaliation for newly imposed United Nations sanctions.[372] John Markoff, of the *New York Times*, reports that "cyberwarfare specialists cautioned . . . that the Internet was effectively a 'wilderness

366. *Id.*

367. *Dammed if You Do*, ECONOMIST, June 27, 2009, at 49.

368. *Id.*

369. Posting of Sky Canaves to Wall Street Journal Blogs: China, http://blogs.wsj.com/chinajournal/2009/07/01/green-dam-and-the-politics-of-consent (July 1, 2009, 01:47 EST).

370. *See* John Markoff & Andrew E. Kramer, *U.S. and Russia Differ on a Treaty for Cyberspace*, N.Y. TIMES, June 28, 2009 at A1, *available at* http://www.nytimes.com/2009/06/28/world/28cyber.html.

371. Choe Sang-Hun & John Markoff, *Cyberattacks Jam Government and Commercial Web Sites in U.S. and South Korea*, N.Y. TIMES, July 9, 2009 at A4, *available at* http://www.nytimes.com/2009/07/09/technology/09cyber.html.

372. John Markoff, *Internet's Anonymity Makes Cyberattack Hard to Trace*, N.Y. TIMES, July 17, 2009 at A5, *available at* http://www.nytimes.com/2009/07/17/technology/17cyber.html.

of mirrors,' and that attributing the source of cyberattacks and other kinds of exploitation is difficult at best and sometimes impossible."[373] The policy debate in Washington D.C. has intensified as a result—of course, adding a new dimension to the saga of Internet controls.

B. Returning to the Core Issue Concerning Technology

Returning to the issue of parental control of content of information reaching children via the Internet, much remains to be determined. Wireless technology has brought increased vigilance to what was already a problem-ridden industry. The effectiveness of filtering devices on a home computer or network, already questionable, may fail totally outside the home, depending on the child's skills, abilities, and desires to obtain inappropriate materials.

A careful reading of Supreme Court decisions indicates that the focus has shifted to the use of software filters. The Supreme Court has consistently held that these filters may be considered as the "least restrictive" means to protect minors. As Professor McCarthy notes, however, "The criteria used by software companies in deciding which sites to block often are not transparent, so their congruence with legal standards is difficult to ascertain."[374]

In looking carefully at "filter technology," it is possible to identify certain generic or perhaps endemic problems, issues, or concerns that plague the entire area. These include: issues relating to "overblocking" or "underblocking" continue to persist as they relate to the ability of a filter to block pornographic pictures or images that are not accompanied by text;[375] the availability of software designed to monitor content that is retrieved rather than to block a particularly identified site, which may alleviate some of the concerns raised regarding "overblocking" and "underblocking";[376] the fact that many decisions relating to restrictions on particular sites or Internet content are ideally to be devised by the community but in reality are being

373. *Id.*

374. McCarthy, *supra* note 163, at 95 (citing Paul Smith, *Free Speech Groups to Filtering Companies: Come Clean*, ESCHOOL NEWS (Aug. 2003), at 8). Professor McCarthy has raised a number of these issues in the discussion of Internet filtering in her seminal article.

375. *See* Kevin Saunders, *Do Children Have the Same First Amendment Rights as Adults? The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 259 (2004).

376. *See generally*, Committee to Study Tools and Strategies for Protecting Kids from Pornography, National Research Council, YOUTH, PORNOGRAPHY, AND THE INTERNET (Dick Thornburgh & Herbert Lin eds., National Academies, 2002), *available at* http://www.nap.edu/html/youth_internet (last visited July 17, 2009).

made by software developers; the possibility that problems relating to a minor's access to harmful materials—no matter how constitutionally that may be defined in the future—might be addressed by a process known as *internet zoning,* in essence creating a separate "X-rated Internet domain" that could only be accessed with software purchased with age verification[377]—adopting the viewpoint that the burden of protecting minors should be placed on individuals who are attempting to gain access to any such "X-rated zone" rather than on the developers, creators, or distributors of the alleged offensive or inappropriate materials;[378] the fact that many parents are unaware of filters or filter technology or that many parents may not be inclined to censor their children's Internet access;[379] the difficulties inherent in applying "community standards" to the determination of what is or may be considered "harmful" to a minor, in short, because of the truly "global reach of the transmissions to very diverse communities and countries";[380] questions of the definition of the word "minor" itself, asking whether the term refers "in a literal sense to an infant, a five year old, or a person just shy of age seventeen"[381]; and the question of whether there should be different categories of minors, with greater protections being afforded to younger children or younger minors.[382] One commentator, Amitai Etzioni, a distinguished professor of sociology, suggested that a possible solution lies in having separate computers for children and adults—which presumably might work in a library or video-rental setting, but would be quite problematic regarding home computers where some amount of censorship under the guise of parental involvement would still be required.[383]

377. *See* Todd A. Nair, *Finding the Right Approach: A Constitutional Alternative to Shielding Kids from Harmful Materials Online*, 65 OHIO ST. L.J. 451, 481–85 (2004). This approach may be analogized to that found in many "adult bookstores" where certain materials would be placed "in a secluded location, off in the back, where children cannot go." *Id.* at 490.

378. *Id.* at 481.

379. *Id.* at 33.

380. McCarthy, *supra* note 250, at 98 (citing, e.g., Kelly M. Doherty, *An Analysis of Obscenity and Indecency on the Internet*, 32 AKRON L. REV. 259 (1999)).

381. Interestingly, the government, in its defense of COPA, had argued that "minors" are older adolescents who may be capable of possessing a prurient interest"—harkening back to the definition of pornography found in *Miller*. *See* ACLU v. Ashcroft, 322 F.3d at 253, 256.

382. McCarthy, *supra* note 250, at 100.

383. Amitai Etzioni, *Do Children Have the Same First Amendment Rights as Adults? On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 28–29 (2004).

C. Concluding Comments

What generations have previously sought out in pictures and magazines can now be found online—only much more graphically and explicitly—and some of it with much hate, bigotry, and violence. Not only mobile phones, but also laptop computers, and any handheld portable device or toy such as a Play Station Portable or Nintendo which has Internet access "can download porn from any unsecured server they find on a street corner."[384] Once downloaded, those materials can be copied and played on any device, despite the presence of a filter.

In 2008, Nielsen reported that 77 percent of U.S. teens had their own mobile phone and another 11 percent said that they regularly borrowed one.[385] The same report also described teens as "users of advanced mobile data features."[386] Nielsen also reported that "37% of U.S. mobile subscribers 13–17 accessed the Internet on their mobile phone—this ranks U.S. teens second behind 50% of China's mobile teens, in terms of mobile Internet penetration."[387] Another survey on teen usage of mobile phones by Cox Communications, in conjunction with the *Center for Missing and Exploited Children*, found that one-fifth of teen users surveyed said that they had engaged in "sexting" (sending, receiving, or forwarding text messages containing nude photos) and 44 percent said that they had no parental controls of any kind on their cell phones' Internet access.[388]

Children are accessing the Internet on their mobile phones at an even earlier age. Another Nielsen report found that one-third of U.S. "tweens" (ages 8–12) had their own mobile phone.[389] Of those, some 5 percent access the Internet over the phone each month.[390] What may be more telling from this survey's data, however, is the fact that, like their teen counterparts, "mobile content is also a social medium for this audience: 26% of tween mobile internet users say they access

384. Barbara Biggs, *Kid Porn Battle Needs More Than Filters*, COURIER MAIL (Australia), Nov. 29, 2007, at 35.

385. NIELSEN, HOW TEENS USE MEDIA 8 (2009), *available at* http://blog.nielsen.com/nielsenwire/reports/nielsen_howteensusemedia_june09.pdf.

386. *Id.*

387. *Id.*

388. Cox Communications, *Teen Summit on Internet & Wireless Safety*, http://www.cox.com/takecharge/safe_teens_2009/ (last visited July 17, 2009).

389. Nielsen Mobile, *One Third of US Tweens Own a Mobile Phone*, Dec. 3, 2007, http://www.marketingcharts.com/interactive/one-third-of-us-tweens-own-a-mobile-phone-2598/.

390. *Id.*

the web while at a friend's house and 17% say they do so at social events."[391]

Increasing concerns regarding children viewing not only pornography and other obscene materials, but also cybercrimes of all sorts involving children, including online bullying, child grooming by pedophiles, and privacy issues involving the use of GPS systems, have once again turned the discussion toward regulation. While some parts of the world take positions such as that of China, requiring filters on search engines, other parts of the world watch the U.S. with interest. "What happens in the USA with respect to the Internet has great significance in Internet jurisprudence for the simple reason that a majority of Internet related litigation takes place in that country."[392]

391. *Id.*

392. Abhilash Nair, *Mobile Phones and the Internet: Legal Issues in the Protection of Children*, INT'L REV. L. COMPUTERS & TECH. 20 (March–July 2006).

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